INDEX

	Original	Print
Caption	1	1
Complaint	2	1
Answer	5	4
Interrogatories propounded to plaintiff	10	8
Answers to interrogatories propounded to plaintiff	13	9
Interrogatories propounded to defendant	15	11
Answers to interrogatories propounded to defendant	19	14
Motion to have defendant answer certain interrogatories more fully	23	16
Memorandum in support of motion	28	20
Order that defendant answer certain interrogatories more fully	29	21
Answer of defendant to certain interrogatories in accordance with order of Court	30	21
Motion and order substituting Martin P. Durkin, Secretary of Labor, in lieu of present plaintiff Maurice J. Tobin	33	23
Motion and order substituting James P. Mitchell, Secretary of Labor, in lieu of present plaintiff Martin P. Durkin	35	24
Stipulation of counsel for purpose of trial of case	37	26
Exhibit A attached to stipulation being summary of sales	39	28
Minute entry of trial of case and submission	40	28
Testimony of Nick Mavar, called at instance of plaintiff	41	29
Deposition of Savare De Felice	84	51
Deposition of Nick Mavar	115	67
Findings of fact and conclusions of law	145	82
Judgment	149	85
Notice of appeal	150	85
Designation of contents of record on appeal	151	86
Clerk's certificate	152	87

	Original	Print
Proceedings in U. S. C. A. for the Fifth Circuit	88	
Minute entry of argument and submission [omitted in printing]	88	88
Opinion, per curiam	89	88
Judgment	90	88
Clerk's certificate [omitted in printing]	91	89
Opinion, Holmes, J. in Donnely et al. v. Marvar Shrimp & Oyster Co., et al., No. 13419	92	89
Order allowing certiorari	104	96

I

[1] United States District Court, Eastern District of Louisiana, New Orleans Division

No. 3392 (Civil Action)

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

MYRTLE GROVE PACKING COMPANY, A CORPORATION, DEFENDANT

Appearances: Messrs. Stuart Rothman, Solicitor, Earl Street, Regional Attorney, Harry Campbell, Jr., Asst. Regional Attorney, Attorneys for Plaintiff-Appellant. Messrs. Chalin O. Perez and W. L. Guice, Attorneys for Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within Forty (40) Days from the 10th day of March 1954 at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court for the Eastern District of Louisiana, bringing the return day up to and including the 8th day of June 1954.

[2] *Complaint*

Filed February 29, 1952

[Number and title omitted.]

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 *et seq.*) hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Louisiana, having its principal office and place of business in Myrtle Grove, Plaquemines Parish, Louisiana, within the jurisdiction of this court, and is, and at all times

hereinafter mentioned was, engaged at that place of business in the production, sale and distribution of canned shrimp and oysters.

IV

At all times hereinafter mentioned, defendant employed and is employing, in accordance with seasonal demands, approximately 200 employees in and about its place of business in Myrtle Grove, Louisiana, in the production of canned shrimp and oysters, as that term is defined by the Act. All of the operations carried on by the defendant in said establishment are integrated and designed to facilitate and are subservient to the canning of said shrimp and oysters. All of the shrimp [3] and oysters handled at said establishment are canned prior to their disposition. Substantially all of the goods produced by these employees have been, and are being, produced for interstate commerce and have been, and are being, shipped, delivered, transported, offered for transportation and sold in interstate commerce from defendant's said place of business to other states.

V

Defendant repeatedly has violated and is violating the provisions of Sections 6 and 15 (a) (2) of the Act by paying to many of its employees, for their employment in the production of goods for interstate commerce, as aforesaid, wages at rates less than 75 cents per hour during the period subsequent to January 25, 1950.

VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act, in that since January 25, 1950, it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and

other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek, the regular rate of pay, the basis upon which wages are paid, the total straight time earnings for each workweek, and the total weekly overtime excess compensation with respect to many of its employees.

[4] VIII

Defendant repeatedly has violated and is violating the provisions of Section 15 (a) (1) of the Act in that since January 25, 1950, it has shipped, delivered, transported, offered for transportation and sold in interstate commerce from its said place of business to other States, goods in the production of which many of its employees were employed in violation of Section 6 of the Act as alleged.

IX

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Act, and such other and further relief as may be necessary and appropriate.

(S) Wm. S. Tyson,
WILLIAM S. TYSON,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, JR.,
Assistant Regional Attorney,
United States Department of Labor.

Post office address: Earl Street, Regional Attorney, Office of the Solicitor, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

[5] *Answer of defendant Myrtle Grove Packing Company*

Filed April 14, 1952

[Number and title omitted.]

FIRST DEFENSE

1. The defendant admits the allegations of paragraph 1 of the complaint.

2. The defendant denies that as a matter of law that jurisdiction is conferred upon the Court by Section 17 of the act referred to in paragraph 1 of the complaint.

3. The defendant admits the allegations of paragraph 3 of the complaint, except that it denies that it was exclusively engaged in the sale and distribution of canned shrimp and oysters, averring as a matter of fact that in addition to selling and distributing canned oyster and shrimp it sold and distributed these products by means other than canning.

4. The defendant admits that it employed numerous persons in its demands at Myrtle Grove, Louisiana, but denies that they were engaged exclusively in the production of canned shrimp and oysters as that term is defined in the act referred to above. It denies as a matter of law and of fact that all of the operations carried on by the defendant in its establishment at Myrtle Grove, Louisiana, are integrated and designed solely to facilitate and are subservient to the canning of shrimp and oysters; it denies that all of the shrimp and oysters handled in said establishment are canned prior to their disposition; it admits that substantially all of the goods produced by the defendant are being produced for interstate commerce.

5. Defendant denies that it has violated or is violating provisions of Sections 6 and 15 (a) (2) of the Act as construed by the Courts, or by the meaning [6] of the act, by paying to many of its employees for their employment in the production of goods in interstate commerce wages of less than 75¢ per hour, and that this condition existed during the period subsequent to January 25, 1950.

6. It admits that on October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the present existing act, issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to every provision of the act. However, this defendant says that it is not subject to the provisions of the act, except

for those persons employed by it in the process involving canning of shrimp and oysters and as to these people it has kept all records required by law or the act above referred to and have paid all minimum salaries prescribed by law.

7. Defendant denies that it is subject to the provisions of the act above referred to, or that it has repeatedly violated or is violating the provisions of any of the sections of the act as construed by the courts, and it denies that since January 1950 it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as to any persons who under the act as construed by the Courts come within the pervue and meaning of the minimum wage law, and it denies that it is required by law to show adequately and accurately the wages, each work day and each work week, the regular wage of pay, the basis of which wages of pay, and the total weekly overtime excess compensation with reference to any of its employees who come not as a matter of law within the pervue and meaning of the 75¢ minimum expressed in the present wage and hour law.

8. The defendant denies that as a matter of law it has violated and is violating the provisions of 15 (a) (1) of the present wage and hour law in that since January 25, 1950, it has shipped, delivered, transported, offered for transportation and sold in interstate commerce from its place of business goods produced in violation of any provisions of the act incumbent upon it to observe by the wage and hour law as construed by the Courts.

9. Defendant denies that it has since the effective date thereof repeatedly violated the provisions of the act referred to in the complaint, or that a judgment enjoining and restraining the violation alleged in the complaint is authorized by Section 17 of the act referred to in the complaint.

[7] In conclusion the defendant says that the plaintiff is not entitled to any judgment, especially a judgment permanently enjoining and restraining this defendant, its officers, agents, servants, or employees and all persons acting or claiming to act in its behalf or interest for violating the provisions of the sections of the act referred to in the complaint filed herein.

Second Defense

Adopting all of the answers and statements made in the First Defense with reference to the jurisdiction and rights of suit, of the plaintiff herein, and for further defense to the complaint exhibited against it, the defendant says:

1. That it is not subject to the provisions of Sections 6, 15 (a) (2), 11 (c) and 15 (a) (5) of the present existing act known as the wage and hour law for the reason that under Section 15 (a) (5) of said Act, as amended, all persons employed by it in the cultivation, catching, taking, transporting, processing, etc. of aquatic products, such as shrimp and oysters "other than canning" are exempt from the provisions of said act; that while it maintains a shrimp and oyster processing plant at Myrtle Grove, La., every process involved in the preparation for market of the shrimp and oysters processed therein is a separate and distinct one from the other because these shrimp and oysters received from boats, etc., on the same day and from the same shipments are processed, by means of picking or cleaning the shrimp and by means of shucking or opening the oysters; that, after processing, these products are used for many purposes, including but not limited to the canning thereof. That when that part of the raw product, which the plaintiff says is shrimp and oysters, cultivated or caught in the waters of the State of Louisiana, and brought by means of boats to its factory in Myrtle Grove, La., is brought into that part of its processing plant devoted to the shucking of oysters and to the picking or cleaning of shrimp, it is unknown then and remains unknown until after the entire operation has been finished whether the shrimp shall be (a) picked, boiled and placed in cans not hermetically sealed for sale and shipment, or (b) headed and in the otherwise raw state placed in paper boxes for quick freezing and thereafter shipped as frozen shrimp, or (c) placed in hermetically sealed cans and shipped in packages as canned shrimp; that as to oysters, the oysters are either canned at the plant or removed many miles distant from the plant and used for other purposes, including canning, so [8] that at no time during the process at the plant of the defendant, where wages are paid ranging from 75¢ to $1.50 per hour, is there any absolute or continuous integration of this work with the after added and necessary process of canning, and, therefore, the process of cleaning the shrimp and picking the oysters is a separate and distinct process, one which would be required were the oysters and shrimp to be used for many purposes other than canning and which in none of its pertinent and essential particulars is necessarily involved in the act of canning. That as to all persons employed by the defendant in its separate and distinct canning establishment a full and complete record is kept, wages by the hour are paid, equal to or in excess of 75¢ an hour, and only in those positions of the work specifically exempted by the law, and particularly by the law as construed by the Circuit Court of Appeals for the Fifth

Circuit, has there been any failure on the part of the defendant to keep a full and complete record of the names, days of work, hours of work, hourly pay and total weekly pay of any of its employees; and this defendant says that it is unnecessary for it to keep such records unless such employees fail to come within the general exemption set out in Section 13 (a) (5) of the presently existing wage and hour law found in Title 29 U. S. C. A. Section 201 et sequiel, and therefore, in employing any persons mentioned in the act as construed by the court, except such persons to whom full and complete wages have been paid and full and complete records of all their time has been kept, this defendant is not obligated to answer further the allegations of the complaint or to voluntarily come within the pervue of a law with reference to its employees which were exempted from the provisions of the act mentioned in the complaint.

THIRD DEFENSE

Adopting all of the answers heretofore made in the First Defense herein set forth as to the inadequacy of the jurisdiction of the court and for the purpose of further setting forth its defense under the law, or any other law, attempted to be charged by the plaintiff, this defendant says:

1. That the complaint wholly fails to set forth sufficient facts upon which this court can find that the defendant has violated any provision of any existing law of the United States, especially in view of the decision of the United States Fifth Circuit Court of Appeals, rendered in the case entitled *Donnelly, et al.* v. *Mavar Shrimp & Oyster Co., Ltd. et al.*, 190 F. (2d) 409 and for this reason the complaint as to this defendant should be dismissed [9] as it wholly fails to set out any cause of action for which the defendant would be liable to answer to before this honorable court.

Respectfully submitted.

(S) C. O. Perez,
CHALIN O. PEREZ,
Solicitor.

(S) W. L. Guice,
W. L. GUICE,
Solicitor.

Post Office Address: Chalin O. Perez, L. H. Perez & Sons, American Bank Building, New Orleans, Louisiana; W. L. Guice, member of the firm of Rushing & Guice, First Bank Building, Biloxi, Mississippi.

I hereby certify that copy of the above answer of defendant, Myrtle Grove Packing Company has this date been served on

counsel for plaintiff, Mr. Earl Street, Regional Attorney, Office of the Solicitor, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas, by the deposit thereof on this date in the United States mail, properly stamped and addressed to such counsel. April 14, 1952.

(S) C. O. Perez,
CHALIN O. PEREZ,
2307 American Bank Building, New Orleans, Louisiana.

[10] *Interrogatories propounded to plaintiff under Rule 33, Federal Rules of Civil Procedure*

(Filed May 26, 1952)

[Number and title omitted.]

INT. 1. In paragraph 4 of your complaint you state that the Myrtle Grove Packing Company employs approximately two hundred employees in and about its place of business in Myrtle Grove, Louisiana, in the production of canned shrimp and oysters, as that term is defined by the act. Will you please state what is meant by "as that term is defined by the act"?

INT. 2. Will you please state what groups or classifications of employees you claim are engaged in work not covered by the exemption and which would come within your construction of the words other than canning?

INT. 3. In paragraph 5 you have stated that the defendant repeatedly has violated and is violating the provisions of Sections 6 and 15 (a) (2) of the act by paying to many of its employees wages at rates less than 75¢ per hour during the period subsequent to January 25, 1950. Can you give us the names of the employees and the dates which you allege the defendant paid for this labor at a rate of less than 75¢ per hour?

INT. 4. You allege in paragraph 7 of your complaint that the defendant has repeatedly violated and is violating the provisions of Sections 11 (c) and 15 (a) (5) in that since January 25, 1950, it has failed to make, keep and preserve [11] adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it as is prescribed by the act. Will you please state by name the employees and the classifications or groups of the employees which this defendant failed to keep and preserve adequate and accurate records and the record of the conditions and practices of employment with reference to such persons?

INT. 5. You state in paragraph 8 of the complaint that the defendant has repeatedly violated and is violating the provisions of Section 15 (a) (1) of the act in that since January 25,

1950, it has shipped, delivered, transported, offered for transportation and sold in interstate commerce from its place of business to other states goods in production of which many of its employees were employed in violation of Section 6 of the Act. Will you please state the name and classification of the groups of employees who were employed in violation of the act as alleged in the complaint by you?

INT. 6. In your prayer for relief you request that the defendant be permanently enjoined and restrained from violating the provisions of Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the act. Will you please state the particular act or acts of the defendant you as plaintiff in this cause desire the defendant permanently enjoined and restrained from performing?

Respectfully,

MYRTLE GROVE PACKING COMPANY,
A CORPORATION,
By (S) W. L. Guice,
W. L. GUICE,
Attorney at Law,
First Bank Bldg., Biloxi, Miss.
By (S) C. O. Perez,
C. O. PEREZ,
Attorney at Law,
American Bank Bldg., New Orleans, La.

[12] I, Chalin O. Perez, of counsel for defendant, do hereby certify that I have this date mailed a true and correct copy of Interrogatories propounded to Plaintiff under Rule 33, Federal Rules of Civil Procedure, postage prepaid to William S. Tyson, Solicitor of the Department of Labor, U. S. Department of Labor, Washington 25, D. C., and Earl Street, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas, the attorneys of record for the plaintiff.

This 26th day of May 1952.

(S) C. O. Perez.
CHALIN O. PEREZ.

[13] *Answers to interrogatories*

Filed June 9, 1952

[Number and title omitted.]

I

The phrase "as that term is defined by the Act" refers to the word "production" which is defined by Section 3 (j) of the Fair Labor Standards Act of 1938, as amended.

II

None of the employees in the defendant's plant at Myrtle Grove, Louisiana, are within the exemption granted by Section 13 (a) (5) of the Fair Labor Standards Act of 1938, as amended, except those handling shrimp and oysters prior to their picking or shelling.

III

Plaintiff states that the allegations in paragraph V of the Complaint filed herein refers to the operating periods of the defendant at all times subsequent to January 25, 1950, and refers to employees employed to pick or shell shrimp and/or shell oysters, including Nellie H. Stevenson, Ernestine S. Vance, Dora Hall, Bertha Britton, Earl S. Britton, Regina Jones, Sadie A. Morris, Gertrude Miller, Vivian Coleman, Helen Reddick, Dorothy Marshall, Alice Lewis, Odessa Davis, Agnes Mackey, Dorothy Mackey, Martha La France, Mary Carson, Pauline Miller, Mildred Wilson, Anna Wilson, Ruby Woody, Elizabeth Sanders, Alcede Jones, Olivia Bartholomew, Leona Bartholomew, Maude Preston, Amellians Phillips, Clementine S. Roy, Velma Miller, Bertha Ross, Della Berry, Virda Stevens, Elsie Grandison, Dorothy Lewis, Gertrude Trufant, Eva Sylve, Elsie Souvinette, and others.

[14] IV

The allegations in paragraph VII of the Complaint refer to the employees referred to in answer number III hereof.

V

The allegations in paragraph VIII of the Complaint refer to the employees referred to in Paragraph III hereof.

VI

The prayer for relief prays the Court's judgment enjoining the defendant from violating the minimum wage, record keeping, and "hot goods" provisions of the Act.

(S) Wm. S. Tyson,
WILLIAM S. TYSON,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, Jr.,
Assistant Regional Attorney,
United States Department of Labor.

Harry Campbell, Jr., one of the attorneys of record for the plaintiff in the above styled and numbered cause, states that he has read the within and foregoing answers to interrogatories propounded by the defendant, and that he is informed and believes and therefore avers that the same are true and correct.

(S) Harry Campbell, Jr.
HARRY CAMPBELL, Jr.

Subscribed and sworn to before me this 6th day of June 1952.

[SEAL] (S) KATHERINE LAIN,
Notary Public.

Harry Campbell, Jr., one of the attorneys of record for the plaintiff in the above styled and numbered cause, hereby certifies that he did on the 6th day of June 1952, serve a copy of the within and foregoing answers to interrogatories propounded by the defendant by mailing a full, true, and correct copy thereof to W. L. Guice, attorney at law, First National Bank Building, Biloxi, Mississippi, and C. A. Perez, attorney at law, American Bank Building, New Orleans, Louisiana, attorneys of record for the defendant above named.

(S) Harry Campbell, Jr.
HARRY CAMPBELL, Jr.

[15] *Interrogatories propounded by plaintiff to defendant*

Filed August 1, 1952

[Number and title omitted.]

Comes now Maurice J. Tobin, Secretary of Labor, United States Department of Labor, plaintiff above named, and serves the following interrogatories on Myrtle Grove Packing Company, a corporation, defendant above named, under Rule 33, of the Federal Rules of Civil Procedure, to be answered within fifteen (15) days from the date of service hereof:

I

Upon what basis are your employees employed in your plant at Myrtle Grove, Louisiana, as shrimp pickers or oyster shellers compensated, that is, on an hourly rate or piece rate basis?

II

(a) Do you maintain a record of hours worked by shrimp pickers or oyster shellers employed by you at your plant at Myrtle Grove, Louisiana?

(b) If the answer to interrogatory II (a) is yes, do such records accurately reflect all hours worked by such employees?

(c) If the answer to interrogatory II (a) is yes, how long have such records been maintained?

III

(a) Do employees employed by you at your plant at Myrtle Grove, Louisiana, receive at least 75 cents an hour per each hour worked by them?

[16] (b) If the answer to interrogatory III (a) is yes, do your records affirmatively reflect such payment by accurately reflecting all hours worked?

(c) If the answer to interrogatory III (a) is yes, for how long have the said employees received not less than 75 cents an hour?

IV

State the number of hours normally worked by shrimp pickers and oyster shellers during the period subsequent to January 1, 1951, during those weeks in which your plant at Myrtle Grove, Louisiana, operated, by day and by week.

V

State the average earnings of shrimp pickers and oyster shellers in your plant at Myrtle Grove, Louisiana, during the period subsequent to January 1, 1951, in weeks in which the said plant operated, by day and by week.

VI

State the average number of employees at Myrtle Grove, Louisiana, employed by you as shrimp pickers and oyster shellers during the period subsequent to January 1, 1951.

VII

List the workweeks during the period subsequent to January 1, 1951 that your plant at Myrtle Grove, Louisiana, operated.

VIII

(a) State in detail the operations carried on at your plant in Myrtle Grove, Louisiana.

(b) Are any canning activities carried on by you in your plant in Myrtle Grove, Louisiana?

(c) If the answer to interrogatory VIII (b) is yes, state the proportion of all shrimp and oysters processed which are canned.

(d) Are any shrimp or oysters processed at your plant in Myrtle Grove, Louisiana, sold fresh?

(e) Are any shrimp or oysters processed in your plant at Myrtle Grove, Louisiana, frozen and sold and shipped as frozen seafood?

[17] (f) If the answers to interrogatory VIII (c) and VIII (d), or either of them, is yes, state the proportion of the shrimp and oysters so handled.

(g) If the answers to interrogatories VIII (c) and VIII (d), or either of them, is yes, state the date such activities were begun.

(h) If the answers to interrogatories VIII (c) and VIII (d), or either of them, is yes, state whether such activities and canning of shrimp and oysters are carried on during the same workweeks.

(i) If processing of fresh or frozen shrimp or oysters, and canning of shrimp or oysters are not carried on in the same workweeks, state the weeks processing of fresh or frozen shrimp and oysters is carried on, weeks in which only canning of shrimp and oysters is carried on, and weeks in which both activities are carried on.

IX

(a) State the gross sales from your plant at Myrtle Grove, Louisiana, separately for fresh shrimp and oysters, frozen shrimp and oysters, and canned shrimp and oysters, for each quarter subsequent to January 1, 1951.

(b) State the gross sales and shipments by you in interstate commerce from your plant at Myrtle Grove, Louisiana, separately for fresh shrimp and oysters, frozen shrimp and oysters, and canned shrimp and oysters, for each quarter subsequent to January 1, 1951.

(S) William S. Tyson,
WILLIAM S. TYSON,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, Jr.,
Assistant Regional Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

[18] Harry Campbell, Jr., one of the attorneys of record for the plaintiff in the above styled and numbered cause, hereby certifies that he did on the 30th day of July 1952, serve a copy of the within the foregoing interrogatories on the defendant by mailing a full, true, and correct copy thereof to W. L. Guice, Attorney at Law, First National Bank Building, Biloxi, Mississippi, and C. A. Perez, Attorney at Law, American Bank Building, New Orleans, Louisiana, attorneys of record for the defendant above named.

(S) Harry Campbell, Jr.
HARRY CAMPBELL, Jr.

[19] *Answer to interrogatories propounded to defendant*

Filed August 8, 1952

[Number and title omitted.]

Now comes the defendant by S. De Felice, general manager of Myrtle Grove Packing Company, who having been duly sworn, in response to the interrogatories served upon the defendant in the above case, makes the following answers and responses:

Answer to Interrogatory 1. These employees are compensated on a piece rate basis, that is they are paid 5¢ per pound for hulled shrimp and 15¢ per pound for shucked oysters.

Answer to Interrogatory 2.

A. No.

B. These records were kept until the decision by the Fifth Circuit Court of Appeals was rendered in that cause styled *Josephine Donnelly, et al.* v. *Mavar Shrimp & Oyster Co., Ltd., et al.*, being No. 13419 on the docket of the Fifth Circuit Court of Appeals.

Answer to Interrogatory 3. A. Our employees being paid on a piecework rate basis earn in some instances much more than 75¢ per hour and the poorer workers, that is old persons and persons who are physically impaired, earn sometimes as low as 50¢ an hour. Some of our workers are blind and others have physical impairments and could not secure employment in any other industry in that area.

B. Our records reflect the payment to these persons but not on a basis of hours as they work intermittantly, that is sometimes a worker will work for two hours and go off for an hour and return and work two hours longer; some workers work a full day and others only a part of a day for the reason that they are wholly independent contractors, we having no control over them except for the manner in which they hull shrimp and pick oysters.

C. This interrogatory is answered next above.

[20] Answer to Interrogatory 4. There is no way of exactly forming an opinion as to the hours normally worked by shrimp pickers for the reason that these people are in a sense independent contractors, recruited from housewives, ex-fishermen, old men and the general inhabitants of the area who are not mentally or physically able to secure full time employment in any of the industries in or around New Orleans and because of the home requirements and for other reasons of the pickers and their absolute right to arrive and depart at any time they desire, on a normal day some would pick two hours, some four hours, and some eight hours.

Answer to Interrogatory 5. We would be unable to give the average earnings of shrimp pickers and oyster shellers in the plant at Myrtle Grove during the period requested for the reason that these people work at other plants and many times our plant will operate for two days or three days and the other plants will work on different days and the people have an absolute right to choose their place of employment on any date. However, we would say that the average earnings of shrimp pickers and oyster shellers for the hours worked at the Myrtle Grove plant for the period set out in the interrogatory will exceed 75¢ per hour, this latter statement being the opinion of the affiant.

Answer to Interrogatory 6. About 150 to 200 persons.

Answer to Interrogatory 7. As our records of daily employment are hard to compile we cannot answer this question within the 15 days allowed by the statute but will produce this information upon the trial of this cause.

Answer to Interrogatory 8. A. We are engaged generally in the processing of shrimp and oysters with a view of distributing these products in frozen, processed and canned packages throughout the country.

B. We can at Myrtle Grove, Louisiana, but this process is separate and distinct from the process of peeling shrimp where this is required and shucking oysters. In fact, it is not always required that the shrimp be peeled and if necessary we would be able to can the oyster meat in another plant associated with the [21] company.

C. We are unable to give this proportion within the time provided for by the statute, but will have this information available upon the trial of this cause.

D. Yes.

E. Some are.

F. We are unable to give within the short time allowed by the statute the exact proportions of goods going through the

initial process of shucking and peeling which are afterwards shipped in a frozen state or in cans not hermetically sealed as it would require a full investigation of all of our records for many years to give this information. However, we expect to compile the information and have it available upon the trial of this cause.

G. We began to ship frozen shrimp immediately upon opening the Myrtle Grove plant and this activity has steadily increased during the period we have operated the plant.

H. Yes, but a different system is used when goods are frozen than when goods are canned and in either case the initial peeling of the shrimp is an entirely separate and distinct process from either the freezing or the canning.

I. This question is answered by the answer to the interrogatory next above.

Answer to Interrogatory 9. A. We are unable to give this information at the present time as our office force is insufficient to cull out all the old records, some of which are insufficient to properly show this information for the reason that in the beginning of our operation the plant was under a different manager and the records were not fully and properly kept.

B. This question is answered in the answer to the interrogatory next above and to the best of our ability this information will be secured and made available to the plaintiff either before or at the time of the trial of this cause.

S. De Felice,
S. DE FELICE,
Manager Myrtle Grove Packing Company.

Post Office Address: Myrtle Grove, Louisiana.

[22] Sworn to and subscribed before me, this 7th day of August A. D. 1952.

[SEAL] (S) DANIEL D. GUICE,
Notary Public in and for
Harrison County, Mississippi.

My commission expires September 5, 1954.

W. L. Guice, of Rushing & Guice, First Bank Building, Biloxi, Mississippi; Chalin Perez, of L. Perez & Son, American Bank Building, New Orleans, Louisiana.

[23] *Motion to have defendant answer certain interrogatories more fully*

Filed August 27, 1952

[Number and Title omitted.]

Comes now Maurice J. Tobin, Secretary of Labor, United States Department of Labor, plaintiff above named, and under

Rule 37 of the Federal Rules of Civil Procedure, respectfully shows the Court:

That on July 30, 1952, he served upon the defendant above named interrogatories in accordance with Rule 33 of the Federal Rules of Civil Procedure, said interrogatories to be answered separately and fully in writing under oath, within fifteen (15) days after their service. That among the interrogatories served as above set out were the following:

VII

List the workweeks during the period subsequent to January 1, 1951 that your plant at Myrtle Grove, Louisiana, operated.

VIII

(a) State in detail the operations carried on at your plant at Myrtle Grove, Louisiana.

(b) Are any canning activities carried on by you at your plant at Myrtle Grove, Louisiana?

(c) If the answer to Interrogatory VIII (b) is yes, state the proportion of all shrimp and oysters processed which are canned.

(d) Are any shrimp or oysters processed at your plant at Myrtle Grove, Louisiana, sold fresh?

[24] (e) Are any shrimp or oysters processed in your plant at Myrtle Grove, Louisiana, frozen and sold and shipped as frozen seafood?

(f) If the answers to Interrogatories VIII (c) and (d), or either of them, is yes, state the proportion of the shrimp and oysters so handled.

(i) If processing of fresh or frozen shrimp or oysters, and canning of shrimp or oysters are not carried on in the same workweeks, state the weeks processing of fresh or frozen shrimp and oysters is carried on, weeks in which only canning of shrimp and oysters is carried on, and weeks in which both activities are carried on.

IX

(a) State the gross sales from your plant at Myrtle Grove, Louisiana, separately for fresh shrimp and oysters, frozen shrimp and oysters, and canned shrimp and oysters, for each quarter subsequent to January 1, 1951.

(b) State the gross sales and shipments by you in interstate commerce from your plant at Myrtle Grove, Louisiana, separately for fresh shrimp and oysters, frozen shrimp and oysters, and canned shrimp and oysters, for each quarter subsequent to January 1, 1951.

That thereafter, on the 7th day of August, 1952, the said defendant served upon the plaintiff its answers to the aforesaid interrogatories, that its answers to the aforesaid interrogatories were as follows:

VII

As our records of daily employment are hard to compile we cannot answer this question within the fifteen (15) days allowed by the statute but will produce this information upon the trial of this cause.

VIII

(a) We are engaged generally in the processing of shrimp and oysters with a view of distributing these products in frozen, processed and canned packages throughout the country.

(b) We can at Myrtle Grove, Louisiana, but this process is separate and distinct from the process of peeling shrimp where this is [25] required and shucking oysters. In fact, it is not always required that the shrimp be peeled and if necessary we would be able to can the oyster meat in another plant associated with the company.

(c) We are unable to give this proportion within the time provided for by the statute, but will have this information available upon the trial of this cause.

(d) Yes.

(e) Some are.

(f) We are unable to give within the short time allowed by the statute the exact proportions of goods going through the initial process of shucking and peeling which are afterwards shipped in a frozen state or in cans not hermetically sealed as it would require a full investigation of all of our records for many years to give this information. However, we expect to compile the information and have it available upon the trial of this cause.

(i) This question is answered by the answer to the interrogatory next above. [The answer to this interrogatory read as follows: Yes; but a different system is used when goods are frozen than when goods are canned and in either case the initial peeling of the shrimp is an entirely separate and distinct process from either the freezing or the canning.]

IX

(a) We are unable to give this information at the present time as our office force is insufficient to cull out all the old records, some of which are insufficient to properly show this information for the reason that in the beginning of our operation

the plant was under a different manager and the records were not fully and properly kept.

(b) This question is answered in the answer to the interrogatory next above and to the best of our ability this information will be secured and made available to the plaintiff either before or at the time of the trial of this cause.

Plaintiff further respectfully shows that the aforesaid answers to each of the aforesaid interrogatories, except Interrogatories VIII (d) and (e), are not responsive to said interrogatories, in that they do not give the information requested by each of the aforesaid interrogatories, [26] nor is any valid reason advanced why full and proper answers should not be given.

Wherefore, plaintiff respectfully moves the Court for an order directing said defendant above named to answer said interrogatories as above set forth fully in writing under oath, as provided by Rule 33 of the Federal Rules of Civil Procedure;

Plaintiff further respectfully moves the Court for such other and further relief under Rule 37 of the Federal Rules of Civil Procedure as may be proper.

(S) William S. Tyson,
WILLIAM S. TYSON,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, Jr.,
Assistant Regional Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

CERTIFICATE OF SERVICE

The undersigned attorney of record for the plaintiff above named hereby certifies that he did on the 25th day of August 1952, serve a full, true, and correct copy of the within and foregoing Motion upon W. L. Guice of Rushing & Guice, First Bank Building, Biloxi, Mississippi, and Chalin Perez of L. Perez & Son, American Bank Building, New Orleans, Louisiana, by depositing the same in the United States mails, addressed to them at the above addresses.

(S) EARL STREET.

[27] Notice to Myrtle Grove Packing Company, a corporation, and W. L. Guice and Chalin Perez, its attorneys of record:

Please take notice that the plaintiff will take up the within and foregoing Motion before the United States District Court at New Orleans, Louisiana, at 10:00 a. m. on the 10th day of September or as soon thereafter as counsel may be heard.

(S) EARL STREET.

[28] *Memorandum*

[Number and title omitted.]

The interrogatories propounded are proper, the facts to be elicited being not only relevant to the principal issue in the proceeding, that is, whether the exemption granted by Section 13 (a) (5) of the Fair Labor Standards Act of 1938, as amended, is applicable to defendant's operations, but will further elicit admissible evidence on that issue:

Brewster v. *Technicolor, Inc.*, 2 F. R. D. 186.
Roth v. *Paramount Film Dist. Corp.*, 4 F. R. D. 302.
Borgen v. *Penn. Greyhound Lines*, 9 F. R. D. 209.
Bush v. *Skidis*, 8 F. R. D. 561.
McNamara v. *Erschen*, 8 F. R. D. 427.

(S) Wm. S. Tyson,
WILLIAM S. TYSON,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, Jr.,
Assistant Regional Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

CERTIFICATE OF SERVICE

The undersigned attorney of record for the plaintiff above named hereby certifies that he did on the 25th day of August 1952, serve a full, true, and correct copy of the within and foregoing Memorandum upon W. L. Guice of Rushing & Guice, First Bank Building, Biloxi, Mississippi, and Chalin Perez of L. Perez & Son, American Bank Building, New Orleans, Louisi-

ana, by depositing the same in the United States mails, addressed to them at the above addresses.

(S) EARL STREET.

[29] *Order that defendant answer to certain interrogatories more fully*

Filed September 10, 1952

[Number and title omitted.]

Now, on the 10th day of September 1952, the above styled and numbered cases came duly on for hearing on the motion of the plaintiff above named to require the defendant to answer interrogatories numbered VII, VIII, and IX heretofore propounded to it under Rules 33, of the Federal Rules of Civil Procedure; and the Court having heard argument of counsel and being fully advised in the premises, concludes that said interrogatories are proper and that the said motion should be sustained;

It is, therefore, ordered, adjudged, and decreed, that the defendant shall, within 30 days from the date hereof, file full, true, and complete answers to the aforesaid interrogatories.

(S) J. SKELLY WRIGHT,
United States District Judge.

Approved:
(S) W. L. GUICE,
(S) C. O. PEREZ,
(S) HARRY CAMPBELL, Jr.
Attorney for Plaintiff.

[30] *Answer to interrogatories propounded by William S. Tyson, et al. and required to be answered by order of the U. S. District Court entered in the above styled cause on the 10th day of September 1952*

Filed September 29, 1952

[Number and title omitted.]

Now comes the defendant by S. De Felice, general manager of Myrtle Grove Packing Company, who having been duly sworn in response to the interrogatories required to be answered by him by the order in the above styled cause dated the 10th of September 1952, makes the following answers and responses, to wit:

Answer to Interrogatory VII

Sixty-six (66) workweeks.

Interrogatory VIII

Answer to Paragraph (a). We are engaged in the production of shrimp and oysters for marketing. The methods of distribution of these products are determined by the prevailing market prices. Therefore, in the case of shrimp, they may be prepared for the whole fresh market, the fresh headless market, whole frozen market, headless frozen market, deveined breaded and frozen market, split-tail market, cook-peeled market, canned market, etc. In the case of oysters, they may be prepared for the whole fresh market, raw stock (shucked) market, fresh [31] frozen (shucked) market, steamed (shucked) market, canned market, etc. These operations are carried on under the supervision of the U. S. Pure Food and Drug Administration.

Answer to Paragraph (b). Yes.

Answer to Paragraph (c). 97.73%.

Answer to Paragraph (d). Yes.

Answer to Paragraph (e). Yes.

Answer to Paragraph (f). 2.27%.

Answer to Paragraph (i). Processing of fresh and frozen shrimp or oysters and canning of shrimp or oysters are carried on in the same workweeks.

Interrogatory IX

Answer to Paragraph (a). Gross sales of fresh shrimp and oysters and canned shrimp and oysters

Quarters	Fresh shrimp and oysters	Canned shrimp and oysters
Jan. 1, 1951, through Mar. 31, 1951	$2,323.25	$161,522.43
Apr. 1, 1951, through June 30, 1951	1,164.00	208,309.61
July 1, 1951, through Sept. 30, 1951		86,313.61
Oct. 1, 1951, through Dec. 31, 1951	10,074.05	120,231.10
Jan. 1, 1952, through Mar. 31, 1952	8,549.55	183,004.26
Apr. 1, 1952, through June 30, 1952		134,211.41
July 1, 1952, through Sept. 8, 1952		58,874.77
Total	22,110.85	952,467.19

Answer to Paragraph (b). Gross sales and shipments in interstate commerce subsequent to January 1, 1951

Quarters	Canned shrimp and oysters shipments	Gross sales
Jan. 1, 1951, through Mar. 31, 1951	47	$161,522.43
Apr. 1, 1951, through June 30, 1951	82	208,509.61
July 1, 1951, through Sept. 30, 1951	34	86,313.61
Oct. 1, 1951, through Dec. 31, 1951	52	129,231.10
Jan. 1, 1952, through Mar. 31, 1952	44	183,004.26
Apr. 1, 1952, through June 30, 1952	24	131,204.91
July 1, 1952, through Sept. 8, 1952	4	14,360.88
Total	287	904,946.80

(S) S. De Felice,
S. De Felice,

Manager, Myrtle Grove Packing Company.

Post Office Address: Myrtle Grove, Louisiana.

Sworn to and subscribed before me this 25th day of [32] September 1952.

[SEAL] (S) Jacob D. Guice,
Notary Public in and for
Harrison County, Mississippi.

W. L. Guice of Rushing & Guice, First Bank Building, Biloxi, Mississippi; Chalin Perez of L. Perez & Son, American Bank Building, New Orleans, Louisiana.

[33] *Motion and order for substitution of plaintiff*

Filed February 23, 1953

[Number and title omitted.]

Martin P. Durkin, Secretary of Labor, United States Department of Labor, moves the Court for an order substituting him as plaintiff in the above styled and numbered cause in the place and stead of Maurice J. Tobin, Secretary of Labor, United States Department of Labor, on the ground that the said Maurice J. Tobin has resigned his position as such Secretary and the applicant, Martin P. Durkin, is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such Secretary has succeeded to all the rights, duties, and prerogatives of the said Maurice J. Tobin, heretofore appearing as the Secretary of Labor, and as

plaintiff in this action, and that there is a substantial need for continuing and maintaining this cause of action.

Dated this 19th day of February 1953.

(S) WILLIAM S. TYSON,
Solicitor,
(S) EARL STREET,
Regional Attorney,
(S) HARRY CAMPBELL, Jr.,
Attorney,

Post Office Address: Office of the Solicitor, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

[34] *Order*

This cause came on to be heard on motion of the plaintiff to substitute Martin P. Durkin, Secretary of Labor, United States Department of Labor, as plaintiff herein in the place and stead of Maurice J. Tobin, his predecessor in office, and it being satisfactorily shown to this Court that Martin P. Durkin is now duly appointed and qualified Secretary of Labor, United States Department of Labor, and that there is substantial need for continuing and maintaining the above entitled action and obtaining an adjudication of the questions involved therein, it is

Ordered that Martin P. Durkin, Secretary of Labor, United States Department of Labor, be, and he hereby is, substituted as plaintiff herein in the place and stead of Maurice J. Tobin, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by the said Martin P. Durkin as successor to the rights, duties, and prerogatives of the said Maurice J. Tobin.

Dated this 23d day of February 1953.

(S) J. SKELLEY WRIGHT,
United States District Judge.

Approved:

(S) W. L. GUICE,
Attorney for Defendant.

[35] *Motion and order substituting plaintiff*

Filed November 2, 1952

[Number and title omitted.]

James P. Mitchell, Secretary of Labor, United States Department of Labor, moves the Court for an order substituting him as plaintiff in the above styled and numbered cause in the

place and stead of Martin P. Durkin, Secretary of Labor, United States Department of Labor, on the ground that the said Martin P. Durkin has resigned his position as such Secretary and that applicant, James P. Mitchell, is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such Secretary has succeeded to all the rights, duties and prerogatives of the said Martin P. Durkin, heretofore appearing as the Secretary of Labor and as plaintiff in this action, and that there is a substantial need for continuing and maintaining this cause of action.

Dated this 29th day of October 1953.

(S) Stuart Rothman,
STUART ROTHMAN,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, Jr.,
Assistant Regional Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, Room 203, 1114 Commerce St., Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

[36] *Order*

This cause came on to be heard on the motion to substitute James P. Mitchell, Secretary of Labor, United States Department of Labor, as plaintiff herein in the place and stead of Martin P. Durkin, his predecessor in office, and it being satisfactorily shown to this Court that James P. Mitchell is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that there is substantial need for continuing and maintaining this cause of action; it is

Ordered that James P. Mitchell, Secretary of Labor, United States Department of Labor be, and he hereby is, substituted as plaintiff herein in the place and stead of Martin P. Durkin, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by the

said James P. Mitchell as successor to the rights, duties, and prerogatives of the said Martin P. Durkin.

Dated this 2d day of November 1953.

(S) HERBERT W. CHRISTENBERRY,
United States District Judge.

Approved:
(S) W. L. GUICE,
Attorney for Defendant.

[37] *Stipulation*

Filed December 15, 1953

[Number and title omitted.]

Comes now the parties above named by their duly authorized attorneys of record and stipulate the following facts for the purpose of trial of this cause:

I

The defendant is a corporation organized and existing under the laws of the State of Louisiana, with its principal office and place of business at Myrtle Grove, Plaquemine Parish Louisiana.

II

Defendant is engaged in the purchase, handling, processing, canning, sale and distribution of shrimp and oysters, as more fully detailed hereinafter. Both parties hereto reserve the right to introduce testimony as to the precise methods of operation of the plant here involved, and defendant specifically reserves its defense that all operations are not subservient to the canning of shrimp and oysters.

III

Substantially all of the shrimp and oysters handled (approximately 95%), processed and canned by the defendant are being produced for interstate commerce and have been and are being shipped, delivered, transported, offered for transportation and sold in interstate commerce from the defendant's plant in Myrtle Grove, Louisiana, to other States.

IV

That the shrimp season for defendant is from about August to May of the following year and the oyster season from about January to May of each year.

V

(a) Employees employed in the shucking of oysters or the picking, cleaning or heading of shrimp are paid on a piece rate basis, their compensation being based upon the quantity of oysters shucked or shrimp picked, cleaned or headed.

(b) The number of individuals employed in the preparing operations vary from day to day in accordance with the receipt of raw shrimp and oysters from fishing boats and the defendant's need of such labor. The number of such employees at the peak of the operating season exceeds 150. Approximately 5 to 10 percent of the employees engaged in the picking, cleaning, or heading of shrimp earn less than 75 cents an hour for their work.

[38] (c) No records of hours worked each day and each week are made, kept, and preserved for employees employed in shucking oysters and cleaning, picking, and heading shrimp.

VI

No monetary violations with reference to any employee employed in operations other than shucking oysters or picking, cleaning and heading shrimp have occurred since November 1950.

VII

That from January 1, 1951, to on or about September 8, 1952, the defendant operated its plant at Myrtle Grove, Louisiana, for approximately 57 workweeks. This period is typical of defendant's operations and practices.

VIII

During the period from January 1, 1951, to on or about September 8, 1952, defendant sold approximately 97.6% of its shrimp and oysters as canned shrimp and oysters in hermetically sealed cans.

IX

During the period from January 1, 1951, to on or about September 8, 1952, defendant's sales of fresh shrimp and oysters, and canned shrimp and oysters by calendar quarters, is set forth in Exhibit A attached hereto.

X

Nothing herein shall be construed as a waiver of any claim of the plaintiff or of any defense of the defendant, and each

party reserves the right to introduce any further and additional testimony not in conflict herewith.

Dated this 14th day of December 1953.

(S) Stuart Rothman,
STUART ROTHMAN,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, JR.,
Assistant Regional Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

(S) W. L. GUICE,
(S) C. O. PEREZ,
Attorneys for Defendant.

[39] *Exhibit A*

Calendar quarter	Total sales	Sales of canned shrimp and oysters	Percent	Sale of Raw [1] processed oysters and shrimp	Percent	Sales of shrimp [2] and oysters with no processing	Percent	Total sold uncanned	Percent
Jan. 1, 1951 to Mar. 31, 1951	$161,522.43	$139,199.18	98.56	.....	.....	$2,323.25	1.44	$2,323.25	1.44
Apr. 1, 1951 to June 30, 1951	208,309.61	207,145.61	99.44	.....	.....	1,164.00	.56	1,164.00	.56
July 1, 1951 to Sept. 30, 1951	86,313.61	86,313.61	100.0	.....	.....	.....	.....	.....	.....
Oct. 1, 1951 to Dec. 31, 1951	120,231.10	110,157.05	91.62	$7,569.05	6.30	2,505.00	2.08	10,074.05	8.38
Jan. 1, 1952 to Mar. 31, 1952	183,004.26	174,454.71	95.32	.....	.....	8,549.55	4.68	8,549.55	4.68
Apr. 1, 1952 to June 30, 1952	134,211.41	134,211.41	100.0	.....	.....	.....	.....	.....	.....
July 1, 1952 to Sept. 30, 1952	58,874.77	58,874.77	100.0	.....	.....	.....	.....	.....	.....
Totals	952,467.19	930,356.34	97.67	7,569.05	.80	14,541.80	1.53	22,110.85	2.33

[1] Includes shrimp that has been headed or peeled and oysters that have been shelled.
[2] Includes only shrimp and oysters sold in shell with no processing whatever.

[40] *Minute entry of trial of case and submission on December 15, 1953*

[Number and title omitted.]

This matter came on this day for trial:

Present: Harry Campbell, Jr., Attorney for Plaintiff; W. L. Guice, Chalin Perez, Attorneys for Defendants.

The following named witness, being first duly sworn by the Clerk testified on behalf of the plaintiff: Nick Mavar.

Thereupon the plaintiff rested and the defendant rested and the matter was submitted. Counsel for both parties to file findings of fact and conclusions of law and briefs by January 11, 1954.

(Initialed) J. S. W.

[41] *Testimony of Nick Mavar*

(Filed January 26, 1954)

[Number and title omitted.]

Appearances: Harry Campbell, Jr., Esq., Assistant Regional Attorney, U. S. Department of Labor, Room 203, 1114 Commerce St., Dallas, Texas. W. L. Guice, Esq., Daniel D. Guice, Esq., Rushing & Guice, First Bank Building, Biloxi, Mississippi, Attorneys for Defendant. C. O. Perez, Esq., American Bank Building, New Orleans, Louisiana, Attorney for Defendant.

(Above entitled and numbered matter came up for trial on this, the 15th day of December 1953, in the Courtroom, United States Post Office Building; the Honorable J. Skelly Wright, District Judge, presiding.)

[42] PROCEEDINGS

The COURT. Are you gentlemen ready to proceed?

Mr. CAMPBELL. We are ready, Your Honor.

The COURT. Is the defendant ready?

Mr. GUICE. Yes, sir.

The COURT. Let's proceed.

Mr. CAMPBELL. Would you like a brief statement of the issues?

The COURT. Yes.

Mr. CAMPBELL. This action is brought by the Secretary of Labor to enjoin violations of the Fair Labor Standards Act on the part of Myrtle Grove Packing Company. It is limited to those employees of the company who are engaged in shucking oysters and peeling and heading shrimp. No question is raised about employees engaged in the actual placing of the shrimp and oysters in cans. They are properly paid.

The parties have entered into a stipulation which will be offered as Government's Exhibit 1, which, with your permission, I can summarize briefly: That the defendant is a corporation, as charged; and that it is engaged in the purchasing, processing, canning, and sale and distribution of canned shrimp and oysters; and, as more fully set out in the body of the stipulation, that in excess of approximately ninety-five per

cent of the shrimp and oysters handled are [43] shipped in interstate commerce; that the number of individuals employed in shelling oysters and handling shrimp varies, of course, with the amount of business, rising at times to as many as 150; that approximately five to ten per cent of the employees engaged in picking, cleaning or heading shrimp, earn less than seventy-five cents per hour. And as part of that stipulation it is further stipulated that employees engaged in shelling oysters do receive at least seventy-five cents an hour; that no record of hours worked are kept either for the employees handling oysters or the employees handling shrimp; that the period from January 1, 1951, to on or about September 8, 1952, is typical of the defendant's operations and practices, and there is attached a table setting forth the dollar sales by quarters, including the sales of shrimp and oysters canned, the sale of raw processed oysters and shrimp, and the sale of shrimp and oysters without processing, which I think we will show constitutes sales from the dock when either they have not enough oysters to process, or seafood to process, or where they have more than they can handle. The figures there, I think, largely speak for themselves. In summarizing, it shows that during the several quarters approximately $950,000.00 were the total sales which were made, of which $930,000.00 were of canned shrimp and oysters, or 97.67 per cent; $7,569.00 were the sales of raw shrimp or oysters, for a total of eight-tenths of one per [44] cent, and approximately $14,500.00 of shrimp and oysters sold in the shell, for approximately 1.53 per cent. The stipulation leaves both parties the right to introduce any evidence not in contradiction with the facts set forth.

I called your Honor's attention to one legal point here in the pretrial, but I don't remember your comments on it, if any were made, and that is that the burden is upon the party claiming an exemption under the Act, pleading the exemption, which has been done here, and also to prove it. I mention that solely from the burden of proof standpoint since as far as I know at this time there would be only one witness, and I don't mind calling him to be an adverse witness, anyhow, to save time.

The COURT. Are you prepared to state your position?

Mr. GUICE. We take the position, may it please the Court, that there is shown no violation of the law, and that the stipulation merely covers the fact that we are engaged in interstate commerce, and that we can shrimp and oysters. We further take the absolute position in our defense that the plant has been passed on in this jurisdiction in the Circuit Court of Appeals in Donnely versus Mavar Shrimp and Oyster Company, and others, and that the facts as testified to by the witness in this

case, the facts affirmatively show that this is a case which comes within the rule of law announced in that case.

[45] The COURT. You are proceeding under the theory that you come within the exception?

Mr. GUICE. That we come within the exception, yes. In other words, that the parties that we pay, the evidence positively shows that we comply with the Wage and Hour Law in all matters involving the canning of shrimp and oysters, but that in the processing of them, which in this kind of case was held to be a distinct and separate item and envisaged by the exception in the law when it was specifically exempted, and as Judge Holmes said then, that the words, as he said, "other than canning," qualified processing, and that it was recognized that processing was one act, and that canning could be processing, but that "other than canning," meant, as he stated very fully by illustration and otherwise, only the actual act of putting these things into hermetically sealed cans for the purpose of preservation. That is our main defense.

The COURT. And you agree that the burden is on you to establish that exception?

Mr. GUICE. That is the legal theory—I won't say that I agree with that. In the first place, as the Court well knows, every one of these regulatory acts is an integration of our rights, but under the Constitution and at Common Law—they come in and say that you can't contract, that you can't agree, that you can't do this and that, so that is contrary to our natural, normal rights. Now, when they go out and passed [46] that law, according to the rule announced by most Courts, they say that the exception, if you plead it you must show it, but in considering that the Courts have also taken that into consideration together with the further fact that the law itself, the basis of it, is contrary to the normal and natural rights that we enjoy under the Common Law and under our Constitution, so while we say or we will agree as it is that it would be so, that what we call the burden—it makes me think of a talk that the Chief Justice of our Supreme Court once made before the Bar Association when he said about presumption, he said, "Presumption: that which dreams are made of." There is a burden, but it is not a strong or heavy burden in this case, sir.

The COURT. I think that we are in agreement. We will now go ahead with the witnesses.

Mr. CAMPBELL. I'll call Mr. Mavar.

NICK MAVAR, called as a witness at the instance of the Government, after having been duly sworn, was examined, and testified as follows:

By Mr. CAMPBELL:

Q. State your name and address, please.

A. Nick Mavar, Biloxi, Mississippi.

Q. Mr. Mavar, you are President of the Myrtle Grove Packing Company, a defendant here?

A. Vice president.

[47] Q. Are you familiar with its operations?

A. Yes, sir.

Q. How long have you been connected with Myrtle Grove Packing Company?

A. Since its organization—I don't recall the exact years. It's six or eight years.

Q. You handle at Myrtle Grove both shrimp and oysters, is that correct?

A. That's right.

Q. You buy that seafood from the fishermen?

A. That's right.

Q. And they are delivered to your dock, is that correct?

A. Yes, sir.

Q. Taking up oysters first, Mr. Mavar, tell the Court how those are handled at the Myrtle Grove Packing Company, starting from the time they are placed on your dock until they are processed through your plant?

A. Well, they are placed—they come to the wharf and unload into conveyors, which dump them into retort baskets, and then they are put in retort kettles for partial cooking and opening of the shells, so that they will be easily shucked, and these baskets are taken out from the kettles and set out in convenient places in what is called a shucking room, and the workers gather around there—four or five around each basket—to shuck the oysters, and the meat is taken in little [48] pails and carried to a weighing scale and weighed, and they receive their pay there for the oysters that they have shucked.

Q. In other words, the employees that shuck oysters are paid on a piece rate basis on the quantity of oysters, or oyster meat, I should say?

A. That's right.

Q. Proceed.

A. Then the meat is flumed into separate compartments in a packing room—which we call packing room, where the canning takes place. They are inspected and washed and portions of shells and oysters that might not be top quality are removed. Then they are carried along to packing tables where they are put into cans. Each can is weighed separately and run through the canning line, where the lids are put on the cans, and then

put in retort kettles and cooked again. They are then taken out, cased, and ready for shipment.

Q. How long are the oysters cooked in the retort at the beginning?

A. It depends upon the type of oysters—from five to ten minutes.

Q. Do you know what the temperature is in those kettles?

A. No. The temperature—they use more pressure than temperature. It's about a fifteen-pound pressure.

Q. And that, you say, is a partial cooking of the oyster itself?

[49] A. That's right.

Q. It also kills the oysters and makes it easier to open or partially opens the shells, doesn't it?

A. That's right.

Q. Are oysters cooked in that manner if they are going to be sold fresh or frozen?

A. Not as a general practice.

Q. That has not been the practice at Myrtle Grove Packing Company?

A. No, sir.

Q. Because as of that time they are, at least, partially cooked?

A. That's right.

Q. How long can those oysters at that time be held without further processing? Are they perishable?

A. They'll hold not a day—they'll hold for hours.

Q. Normally, as I understand, you wouldn't hold them any longer than necessary to get enough together to start working on, is that correct?

A. No; we hold them from one to three or fours hours, just to run them.

Q. In other words, I say that you hold them no longer than necessary to get enough oysters to get a crew and to start working on?

A. That's right. When we get enough to start canning, [50] we start the canning operations.

Q. From the time the oyster meat is received from—I mean from the time the oyster meat is removed from the shells, they are washed and flushed down to the packing room, is that right?

A. That's right.

Q. How long do you hold them there, or are they held there?

A. That is where they are held.

Q. For how long before they are put into cans?

A. That is the only place that they are held. They are not held in the shucking room, shucking shed. The workers there use pails, and as soon as she fills a pail, which are small pails, she

goes and weighs it and receives her pay. That is immediately flumed into the packing room, and they are held in the packing room until there are a sufficient quantity to bring in the packing girls to pack the oysters.

Q. Again they are held only until you get enough to bring in the packing room crew?

A. That's right.

Q. Normally that wouldn't be more than an hour or so, would it?

A. That's right.

Q. After they are placed in the can and the can is sealed, you say they are put in the retort again; do you know [51] what the temperatures of those retorts are?

A. It is 240 degrees—240 or 250.

Q. That's Fahrenheit?

A. Yes, sir.

Q. How long are they cooked there?

A. Thirteen minutes.

Q. That completes the cooking of the oyster as well as sterilizing the can, is that correct?

A. That's right.

Q. Mr. Mavar, in normal circumstances you try to run that as a continuous operation, do you not? In other words, you keep it moving at all times, just a continuous operation, from the shucking on into the final cooking in the cans?

A. It is a more profitable operation to run a continuous line, rather than having to stop.

Q. That is your ideal, at least, to run it through as a continuous line?

A. Yes, sir.

Q. How long, Mr. Mavar, under normal circumstances, and assuming that you have gotten into operation so that you do have a continuous line, does it take from the time the oysters are placed in the first retort until the final cooking of the cans is completed?

A. A couple of hours, I guess.

Q. About two hours?

[52] A. Yes, sir.

Q. That would be a fair average once you get into operation, is that right?

A. I never timed it. I guess at that just a couple of hours.

Q. That is your best estimate as being a fair average?

A. I would think it pretty fair, pretty close, one to two hours.

Q. When oysters are dumped on the dock, how long can they be kept before you start shucking them?

A. You mean before the initial cooking?

Q. Yes.

A. They should be cooked pretty soon, because they go through a washing room when they are first taken off the boat. They are run through a washer, and we wash the bilge off them, and they are good for several hours, but you shouldn't keep them over a day.

Q. Turning to shrimp, Mr. Mavar, you buy those, of course, from fishermen and they are delivered to your dock?

A. That's right.

Q. Under normal circumstances how long can you hold those shrimp before starting the handling of those?

A. Well, when they are delivered to us at the factory they are delivered there for canning. We can them when they come.

[53] Q. You don't want to hold them any longer than you have to?

A. That's right.

Q. Sometimes you don't have enough to start operations?

A. Oh, yes, sometimes.

Q. So you may hold them how long? Perhaps a day or so?

A. Hold them till the next day.

Q. Now, as you did with oysters, Mr. Mavar, explain how the shrimp are handled through your plant?

A. Well, they are unloaded into conveyors, or tanks that have a belt running out of it, with water in the tank, and when they are separated, the ice from the shrimp will float, and the shrimp will sink and come out in the conveyor, where they are then inspected for quality and weighed. After they are weighed they are dumped on the picking tables, where the pickers pick the hulls, separate the hulls from the meat, and they keep the hulls in a bucket and the meat is flumed immediately into the packing room, where it goes for canning there.

Q. As I understand, the employees picking shrimp are paid on the weight of the hulls rather than the weight of the meat?

A. That's right. They keep the hulls in a bucket. When they fill the bucket they take it to a weigh-lady and get paid cash for their ability at piecework, and the meat is flumed [54] into the packing room, where it is put into blanch tanks and partially cooked.

Q. How long do they remain in that tank?

A. Three or four minutes, just a light cook.

Q. That is salt-water blanch?

A. Yes, sir.

Q. It's boiling temperature?

A. Yes, sir. Then that is carried on in the conveyor belt to where they are cooled and inspected, partial hulls removed from them, and carried to a grading machine which separates them

for size: small, medium, large, Jumbo, and so forth. Then they are carried to the packing table and each can weighed and run on down to the canning machine line, and then into a retort kettle for a final cooking.

Q. Is that final cooking about thirteen minutes?

A. The same as it is for oysters, yes.

Q. And the shrimp are then cooked and ready for eating at the conclusion of that cooking in the can, is that correct?

A. That's right.

Q. Would they be ready for eating without further cooking after coming out of the blanch tank?

A. Yes, sir.

Q. That way they are sufficiently cooked to prepare them for eating, is that correct?

A. Yes; they are all right to eat right out of the blanch [55] tank.

Q. Then if you sell any right out of the blanch tank, that would be as cook-peeled shrimp, is that correct?

A. Yes.

Q. And they could be frozen or they could be refrigerated?

A. That's right.

Q. Or they could go on to the can?

A. That's right.

Q. And you try, as with oysters, you try to handle that as a continuous operation?

A. That's right.

Q. With breaks only to amass a sufficient amount to justify bringing your necessary crews?

A. That's right.

Q. Assuming as we did with the oysters, Mr. Mavar, that you had gotten into a continuous operation, how long does it take to run a given batch of shrimp through from the time it is dumped on the picking table to the time its final cooking of the cans is completed?

A. About the same time as oysters.

Q. About two hours?

A. Yes; not over two hours.

Q. Could it be a little less than two hours, Mr. Mavar?

[56] A. Oh, yes. I'd say from one to two hours, just guessing at that particular time.

Q. Does it take as much time, to the best of your knowledge, to handle shrimp as it does to handle the oysters?

A. Well, one shrimp or one oyster? Or 100 barrels, or 500 barrels of shrimp? I don't understand your question.

Q. What I was getting at is, does it take as long to run a given batch of shrimp through as it does a given batch of oysters? Is it a quicker process?

A. It's pretty much the same.

Q. Are you familiar, Mr. Mavar, with the information which was furnished the plaintiff here by the defendant, showing the sale of goods by the company, and which is attached to the stipulation filed in this case? [Document to witness.]

A. Yes, sir.

Q. Calling your attention to the column headed "Sale of shrimp and oysters with no processing," would that be the sale of shrimp or oysters from the dock that you either did not have enough shrimp or oysters to start to work, or where you had more than you could handle?

A. Mostly we didn't have enough.

Q. So you would sell to some other packing concern?

A. Yes, sir.

Q. Because it was cheaper to do that than to fill a crew in?

[57] A. That's right.

Q. That also shows in the column headed "Sales of raw processed oysters and shrimp," that in the quarter of October 1, 1951, to December 31, 1951, some $7,500.00 worth of raw shrimp and oysters were sold?

A. That's right.

Q. And that is the only sales of such raw shrimp or oysters reflected by the table?

A. Yes.

Q. Are you able at this time to remember what the occasions of the sales in that one quarter were?

A. What do you mean?

Q. I mean why in that particular quarter some raw shrimp or oysters were sold, whereas, they were not sold in any other quarter?

A. That could have been sack oysters. It doesn't show it in here what it was.

Q. It doesn't show in the stipulation either.

A. They show as sack oysters. I am pretty sure that was sack oysters.

Q. Generally speaking, it is the practice at the Myrtle Grove Packing Company to can——

A. That's right.

Q. All of it that is good?

A. That's right.

[58] Mr. CAMPBELL. That is all I have.

By Mr. GUICE:

Q. Mr. Mavar, you say you are connected with the Myrtle Grove Packing Company as vice president?

A. Yes, sir.

Q. You are also one of the partners in the Mavar Shrimp and Oyster Company at Biloxi?

A. Yes, sir.

Q. And you are familiar thoroughly with the operations there?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And also the Williams Navigation Company and with the DeJean Company, which is next door to your plant at Biloxi?

A. Yes, sir.

Q. You are familiar with their operations?

A. Yes, sir.

Q. You testified in the case of *Donnely* versus *Mavar Shrimp and Oyster Company* that was decided by Judge Mize, and later by the Circuit Court of Appeals?

A. Yes, sir.

Q. And in this present case or about December 9, 1952, at the request of the defendant, that is, Myrtle Grove [59] Packing Company, your testimony was taken under an agreement with Mr. Campbell in the offices of Rushing & Guice, in Biloxi?

A. Yes, sir.

Q. And that testimony is filed here?

A. Yes, sir.

Q. Now, in that testimony, you haven't been contradicted about that, especially this morning, have you?

A. No, sir.

Q. Now, when your testimony—when the taking of your testimony was concluded at Biloxi, after a casual examination by Mr. Campbell, he requested at that time to cross-examine you on the taking of your testimony, is that correct?

A. Yes, sir.

Q. And you haven't any changes to make in that original testimony, and that is still your testimony?

A. That's right.

Q. And it is according to the facts as you knew of them?

A. That's right.

Q. Now Mr. Campbell has been trying to show that the canning of shrimp and oysters is a continuous process in your plant at Myrtle Grove; now, is it a fact, as you stated in your original testimony, that the average work there, the matter of the work of cleaning the shrimp and oysters is a [60] separate process, the same as it would be over in Mississippi?

A. Yes, sir.

Q. For instance, in Myrtle Grove if you want to handle shrimp for what they call "raw headless," you handle them with the same people who handle the shrimp which afterwards is canned?

A. That's right.

Q. And if you handle shrimp that afterwards you want to sell in the can that is not hermetically sealed, what they call cook-peeled, your handle it in the same way?

A. That's right.

Q. Now Mr. Mavar, Mr. Campbell asked you about how long you could keep the oyster meat after it was opened before you put it in the can, and you replied it could be kept two or three hours, is that correct?

A. Without refrigeration.

Q. But if it was refrigerated you could keep it for a week?

A. Oh, yes.

Q. State to the Court whether or not on many occasions in the operation of your various businesses you have canned, under the supervision of the proper authorities of the United States, that is the Pure Food section, oyster meat that was taken from the oysters over on the Atlantic Coast, and canned at Biloxi?

[61] Mr. CAMPBELL. I object to that question on the ground it is going beyond the range of this lawsuit which involves Myrtle Grove only, and it is getting into the operations of a plant which may or may not be similar in nature.

Mr. GUICE. It is already in evidence, may it please the Court, and there has been no objection to it by the gentlemen. It says right here: "Question: About five years. Now, are you, from having visited the plant of the Myrtle Grove Packing Company, and having had authority with reference to its manner of operation, familiar with the operations generally, of the Myrtle Grove Packing Company?" This is the testimony taken in Biloxi, Your Honor: "Answer: Yes, sir." "Question: Are you likewise familiar with the operations of the Mavar Shrimp and Oyster Company of Biloxi, Mississippi, and the Williams Navigation Company, which were the two companies—the plaintiffs in litigation which afterwards went into the Circuit Court of Appeals under the style of *Donnely* versus the *Mavar Shrimp and Oyster Company?*" "Answer: Yes, sir."

Mr. CAMPBELL. Again, Your Honor, that deposition has not been offered in evidence and is not competent evidence because the witness is here. That was discovery testimony, Your Honor.

[62] Mr. GUICE. No, sir. Now, if the gentleman wants to go back on his agreement—this deposition was taken under agree-

ment with him. Let me read the what-you-call-it here—if he wants to pursue that sort of attack, it's all right with me. I'll go ahead and ask these questions. Here it is:

> Testimony taken today by agreement of both the Plaintiff and the Defendant, is without notice and subject to objections by both parties on the trial of this cause for relevancy and competency. The witnesses appearing have all been sworn in accordance with the laws of the State of Mississippi. Mr. Nick Marvar, was thereupon called as a witness, having been first duly sworn, testified as follows:

After Mr. Campbell had partially cross-examined the witness, he asked then would we present him for a completion of it before Your Honor, and I think in the office of Mr. Perez yesterday he stated it was his purpose to offer the testimony here with the testimony of Mr. Mavar, is that right?

The COURT. What is your position with reference to the deposition?

Mr. CAMPBELL. That deposition very simply, as far as I was concerned, that was discovery. I asked them if they were going to present Mr. Mavar so I wouldn't have to subpoena him as an officer of the company.

[63] The COURT. That was your position? You did not agree that this deposition could be used in lieu of the witness?

Mr. CAMPBELL. No, sir. If I had meant to agree to that, I never would have asked them to present Mr. Mavar.

The COURT. I think that we'd better proceed with the witness since he is here.

Mr. GUICE. I want to take issue with him on that; I'd like the Court to swear me in and let me testify about it, and I'll testify under oath. I have been in the habit of keeping my agreements.

How about the deposition of Mr. De Felice?

Mr. CAMPBELL. That was also a discovery deposition.

Mr. GUICE. In other words, you intend to make your record entirely on Mr. Mavar, is that correct?

Mr. CAMPBELL. When Mr. Mavar is released, I will then rest.

The COURT. The witness is here, so proceed with the questions. Proceed with the witness since he is here.

By Mr. GUICE:

Q. Nick, where do you live?
A. Biloxi, Mississippi.
Q. How old are you?
A. Thirty-nine.

Q. Are you a native of Biloxi?
[64] A. Yes, sir.
Q. What has been your education?
A. I got a B. A. in College.
Q. What school did you attend?
A. University of Mississippi.
Q. In addition to Myrtle Grove Packing Company, what business are you connected with at this time?
A. Mavar Shrimp and Oyster Company, Biloxi.
Q. In what capacity are you connected with them?
A. Partner.
Q. Where is that plant located?
A. Biloxi.
Q. What part of the details of the plant do you have charge of in Biloxi?
A. The outside.
Q. You have charge of the production of the seafood sales in interstate commerce?
A. Yes, sir.
Q. About what is the extent of your business at Biloxi as compared to the business of the Myrtle Grove Packing Company?
Mr. CAMPBELL. I object to this line of testimony; it is outside of the course of this action. Counsel, of course, is relying on the *Donnely* case, which he is entitled to do, but I think he will have to rely on the record made in the *Donnely* case if he wants to point out their similarity or [65] difference.
The COURT. What is the purpose of this examination?
Mr. GUICE. The purpose, may it please the Court, is to try to put in the record the testimony that I thought this gentleman was taken for, in other words, for having it before the Court in defense of our position here today.
The COURT. How is it related, or how is it relevant to this proceeding?
Mr. GUICE. I am just leading up to it. It is my way of laying a predicate.
The COURT. Let's proceed.

By Mr. GUICE:

Q. Now, you are familiar also with the operations of the Myrtle Grove Packing Company?
A. Yes, sir.
Q. Are you familiar with the manner of the placement of their processing rooms for shrimp and oysters, and of the canning rooms, and of other equipment there which you use in the production of shrimp and oysters?
A. Yes, sir.

Q. Are you familiar with that in Biloxi, and also with the plant in Biloxi of the Williams Navigation Company?

A. Yes, sir.

Q. You have been in this business how many years?

A. Twenty-six.

[66] Q. And you have been connected with the plant in Biloxi about twenty-six years?

A. Yes, sir.

Q. And for about five years at Myrtle Grove?

A. Yes, sir.

Q. And you have a thorough knowledge of the physical setup of both plants?

A. Oh, yes.

Q. And of the laborers who work in the plant?

A. Yes, sir.

Q. Is there any material difference in the operations of these plants with reference to the employment of labor for shucking oysters and picking shrimp, that is, Myrtle Grove and the plant at Biloxi?

A. No, sir.

Q. Now, the plants at Biloxi you are referring to is the plant of Mavar Shrimp and Oyster Company, and the plant of the Williams Navigation Company, also called DeJean Packing Company?

A. Yes, sir.

Q. Now, they were plaintiffs in the suit—in the Court below in the suit against Donnely which afterwards was appealed to the Circuit Court of Appeals?

A. Yes, sir.

Q. Now the matter of the employment of the labor [67] at Biloxi, and the manner of the work of the labor at Biloxi, and the result of that work, and the time that work takes in that part of the processing of shrimp and oysters, is there any material difference between Biloxi and Myrtle Grove Packing Company?

A. No, sir.

Q. You state that as a fact, having complete knowledge of both operations?

A. Yes, sir.

Q. Now, when you first went into the shrimp and oyster business did you go in there as a partner, or as executive, or in what capacity?

A. As a worker.

Q. In other words, by "worker" you mean working off and on cleaning shrimp, oysters——

Mr. CAMPBELL. I object to that question. I don't see the purpose of this line of testimony, if your Honor please.

Mr. GUICE. I am going to prove his knowledge of the general handling of these products.

The Court: Let's get to the point.

Mr. CAMPBELL. I'll concede that he knows how it is handled.

Mr. GUICE. Will you concede that? Then I am going to show that he knows of his own knowledge that in the operation of these businesses over a period of many, many, years that time [68] and time again people have operated plants for the canning of oysters wholly distant and not connected with the opening of the oysters and shrimp, and that that has been a successful operation.

Mr. CAMPBELL. I will certainly not object to any such questions, but I want it developed a little further.

By Mr. GUICE:

Q. Do you remember any plant in Biloxi where the physical operations of picking shrimp and shucking oysters, and the latter canning of these articles of seafood after the process has been completed, were completely separated?

A. Yes, sir.

Q. What particular one do you have in mind?

A. The Dunbar-Dukate Company.

Q. About how far distant was their shucking plant from the packing plant?

A. Three to five hundred yards.

Q. Did they do a large business?

A. Well, one of the biggest.

Q. About how many years were they in operation?

A. They are one of the pioneers in the business.

Q. Has your plant in Biloxi, and the Williams plant, and other plants, packed oysters and shrimp that were cleaned and picked at other places?

A. Yes, sir.

[69] Q. About how many miles have you successfully brought shrimp from one place to the other, or oysters, from the place of their origin, where they were processed at one place, and packed them in your plant at Biloxi?

A. There is practically no limit if you keep it under refrigeration.

Q. Have you successfully packed oysters that were first processed on the East Coast of the United States, and also Florida, at your plant?

A. Yes, sir.

Q. In Biloxi?

A. Yes, sir.

Q. Have you packed oysters in your plant at Biloxi that were first processed in Louisiana?

A. No; I don't think.

Q. Do you know any other firm that did that?

A. Oh, yes; it has been done.

Q. Do they do it successfully?

A. Yes; it is done successfully, and with shrimp too.

Q. When these oysters come into your plant down here and they are picked by the pickers, the pickers are paid wages based upon their ability to pick, is that correct?

A. That's correct.

Q. When they pick those oysters, or what we call "shuck," or taking them out of the shell, after they are first processed, [70] is the oyster then the oyster of the Myrtle Grove Company, or the oyster of the man who catches it?

Mr. CAMPBELL. We object to that as being irrelevant and immaterial. As long as this firm is doing the work, it makes no difference who owns the oysters.

The COURT. I think that involves a legal conclusion anyway. I think you can develop testimony as to what the facts are.

Mr. GUICE. What I want to show is that until the oysters are finally weighed, that they remain the property of the fishermen, that they are not even our property. If he wants to take them to the other place and sell them, he can sell them.

By Mr. GUICE:

Q. When do you pay for the oysters back there? Do you pay at the wharf or after the pickers pick them?

A. We pay after they are canned.

Q. After they are canned?

A. Yes, sir.

Q. Then they are not your property until they are canned?

A. That's right.

Q. You have to discover the yield of it?

A. That's right.

Q. When you handle shrimp at Biloxi or at any other place, [71] is there any difference in the mode of your handling the shrimp prior to the canning, or until the original process is completed, as to whether they are later canned, or whether they are put on the market as cook-peeled shrimp, or whether they are sold headless? I mean you go through the same operation?

A. Yes; all of them have some of the same operations.

Q. Do you work it in the same room?

A. All in the same building.

Q. And you pay for it the same way?

A. Same way.

Q. Then state, Mr. Mavar, from your knowledge of over twenty years of shrimping—of shrimp and oyster canning, if the shucking of the oysters and the picking of the shrimp is an original and distinct process wholly unconnected with the canning until afterwards, when you can what shrimp you want and what oysters you want?

Mr. CAMPBELL. I object to that on the ground it is irrelevant and immaterial, and it invades the province of the Court. That is an issue for Your Honor to determine.

The COURT. I sustain the objection.

By Mr. GUICE:

Q. You stated in answer to a question by Mr. Campbell that when shrimp came to your plant that they were immediately put through the initial process of being picked, de-headed, and [72] is that necessary, or have you means of keeping them at the plant?

A. We can keep them.

Q. Do you sometimes keep them?

A. We do, when we don't have enough to run the plant.

Q. How many days, sometimes, do you keep shrimp before they go through any process?

A. It can be kept several days, like if it's bad weather, and you are waiting for shrimp.

Q. When you start your process of canning shrimp, do you know at that time, at the time you start your process of picking them, do you know then whether you are going to can them, or use them for some other purpose?

A. It is very possible that they could be used for any purpose.

Q. But do you stop your operations, or change your operations in the middle of it, so that instead of shipping them as canned shrimp you ship them as something else?

A. They can be shipped cook-peeled instead of putting them in the cans.

Q. Are they done that way occasionally?

A. Oh, yes.

Q. On many occasions?

A. Yes, sir.

Q. What causes the varying demand for canned shrimp, [73] cook-peeled, or fresh shrimp?

Mr. CAMPBELL. I ask counsel whether he is referring to the Myrtle Grove establishment, or some other establishment?

Mr. GUICE. I am referring to this establishment, which is like the other establishments, and which is part of the busi-

ness which is recognized as operating in the same manner that we recognize the operation of a sugar grinding mill, or a gin.

The COURT. Let's confine our questions to this operation. We are talking wholly about Myrtle Grove when you answer your question, unless specifically indicated otherwise. We are talking about Myrtle Grove and nothing else, do you understand that, Mr. Witness?

The WITNESS. Yes, sir.

By Mr. GUICE:

Q. I will ask you with reference to Myrtle Grove Packing Company, when a boatload of shrimp comes in and they are unloaded into baskets or hampers and put on the tables in your first processing room, do you know at that time, or does the management also know at that time whether they will go into a can, or whether they will be used in some other manner?

A. They could be used in some other manner.

Q. Mr. Mavar, when this law was first passed, that is, when there was an attempt made to compel you to conform to [74] the present Wage and Hour Law, did you try to keep a record of the operations of your people?

Mr. CAMPBELL. May it please the Court, we object to that as being irrelevant and immaterial. It has been stipulated that no records are kept.

The COURT. What is the purpose of the question?

Mr. GUICE. I am asking him, of his own knowledge, about his operations at Biloxi——

The COURT. Suppose you state your reasons for it, Mr. Guice.

Mr. GUICE. The reason is to show why—in fact, if you will look at the record here, they don't show any way that we violated the law except that we haven't kept a record of the people down there. I want to show that to attempt to keep a record of the people at Myrtle Grove, and especially since the decision by the Circuit Court of Appeals, would cost us between five and seven thousand dollars a year; and that unless there was a change in the law, as announced by the Circuit Court of Appeals, that there would be no legal compulsion of our undertaking such an expense.

The COURT. I think that is irrelevant and immaterial. As to the question of whether or not it is hard to keep records, that is a question for Congress and not for the Court.

By Mr. GUICE:

Q. Is it possible for you to keep a record of your [75] shrimp and oyster pickers, considering the manner in which they dictate the amount of work?

The COURT. That is the question to which the objection is sustained. Let's proceed to something else.

Mr. GUICE. That was in a little different form, Your Honor.

The COURT. The whole subject matter is out.

Mr. GUICE. That is all.

By Mr. CAMPBELL:

Q. Mr. Mavar, in your plant at Biloxi you regularly sell fresh shrimp and frozen shrimp, do you not, that is, uncanned shrimp?

A. Well, we are in that type of business.

Q. You regularly sell both, canned shrimp and fresh shrimp, don't you?

A. Well, in years gone by we would have said yes, but recently no.

Q. How recently have you stopped? In other words, what are you doing now?

A. We are canning now.

Q. Canning only?

A. Yes, sir.

Q. How long has that been true?

A. The last couple of years.

Q. And at Myrtle Grove for all practical purposes you [76] have done nothing but can shrimp?

A. Practically all canned.

Q. When you start a load of oysters, or a load of shrimp through the line, you know that they are going to be canned, isn't that correct?

A. Pretty much so; yes.

Q. It is a fairly definite assumption that they will go into cans at the end of the process?

A. Pretty much so; yes.

Q. You stated a moment ago, I believe, that companies have engaged in the canning of oysters at establishments away from where they have been shelled?

A. That's right.

Q. And that is not true at Myrtle Grove?

A. No, sir.

Q. And that is not the practice out on the Gulf ports at this time, is it?

A. No; it isn't a practice to have two separate buildings. In that particular operation there it just happened that they were separated, and they continued the operation. They had a trolley track that carried the meat across.

Q. What concern did you say, did you mention, in Biloxi that did that?

A. Dunbar-Dukate Company.

Q. How long has it been since they have done that?

[77] A. Oh, about ten or twelve years.

Q. To the best of your knowledge, how long has it been since anybody in your area, that is, Biloxi and Myrtle Grove, the places you are familiar with, have canned shrimp or oysters that were shelled elsewhere?

A. Oh, about six or seven years ago the McPhillips Packing Corporation picked shrimp at Pass Christian and hauled the meat to Bayou Labatre and canned it.

Q. Did Myrtle Grove ever can shrimp or oysters that were shelled or picked somewhere else, some place else?

A. Not to my knowledge.

Q. How long has it been since the Mavar Shrimp and Oyster Company has done it?

A. During the War.

Q. In other words, since about 1946?

A. Yes, '46 and '47.

Mr. CAMPBELL. I believe that is all.

By Mr. GUICE:

Q. I forgot to ask you, Mr. Mavar, your canning plant where the shrimp and oysters that are canned, hermetically sealed in cans, is that separate and distinct from that part of your factory where the shrimp and oysters are picked?

A. It is a separate room.

Mr. CAMPBELL. We object to that as calling for a conclusion. I have no objection to his describing the [78] setup within the plant.

The COURT. I think he has already described it—he said it was two different rooms.

By Mr. GUICE:

Q. Do any of the employees in one room work in the other room?

A. Not while the work is going on, no.

Q. Do you comply with the Wage and Hour Law as to all the employees engaged in canning?

A. Yes, sir.

Q. Both, shrimp and oysters?

A. Yes, sir.

Q. And the employees that are under consideration in this lawsuit are the employees who are entirely engaged in the process of shucking oysters or picking shrimp?

A. That's right.

Mr. GUICE. That is all.

By Mr. CAMPBELL:

Q. By "employees engaged in canning" you mean those employees who are putting the shrimp or oysters into the cans themselves, sealing the cans, and then cooking them?

A. All employees in the packing room.

Q. Those are the operations that go on in there?

A. That's right.

Mr. CAMPBELL. That is all.

[79] By Mr. GUICE:

Q. So that the Court will know it, in the case of oysters or shrimp, by "employees in the canning room" you mean the employees who receive the raw products, who wash it, inspect it, cook it again, put it in cans, seal them, and cook it again, and then label them, is that correct?

A. That's right.

Q. All the processes are carried on in your canning room by persons whom you pay seventy-five cents an hour, or above that price?

A. That's right.

Q. And you fully comply with the Wage and Hour Law with reference to that?

A. Yes, sir.

Mr. GUICE. That is all.

Mr. CAMPBELL. Nothing further.

The COURT. I missed something with reference to the shrimp that I want to ask you about.

By the COURT:

Q. Before the shrimp are picked, that is, before the heads are taken off, and the shells, are they cooked at all?

A. No, sir. They are raw.

Q. In other words, they are different then from the oysters to that extent?

A. No; the oysters come in raw that way.

[80] Q. The oysters come in the shell, but I understood your testimony that these oysters in the shells were cooked so that they could be opened easily?

A. They are cooked in the shell, that's right. That part is different from the shrimp. I see your question now.

Q. The oysters are cooked to some extent, partially, in the shell?

A. Yes, sir.

Q. Are the shrimp cooked? How about the shrimp, are they cooked at all?

A. No, sir.

Q. So the picking and shelling of the shrimp is the picking and shelling of the absolutely raw shrimp?

A. That's right.

We call it "cooking" the oysters—the oysters actually get the cooking, but the idea of the cook is to open the shell so that it can be shucked.

Q. So it will be easier to shuck?

A. That's right.

Q. When did the Mavar Shrimp and Oyster Company change its operations from a company which sold shrimp and oysters uncanned to a company which sold practically all of its shrimp and oysters canned?

A. That has been two or three years. I think that question is in the records: two or three years.

[81] Q. You said something about '46 or '47; is that right, or would it be later?

A. I think the '46 and '47 answer was to when was the last time we received oysters from a distant point and canned them at Mavar Shrimp and Oyster Company. Our operations now is that we are strictly canning. That is determined by the market conditions, and now it is profitable for us to do strictly canning—the headless market is off, but the headless market might get good and the canning market off or bad, but we still have all our equipment and we can have the headless, or we can can them, or we could cook-peal them. We have the equipment to do it, so it just depends upon what the market conditions are.

Q. For the last two or three years your operations in Biloxi has been a canning operation almost one-hundred per cent?

A. Canning almost one hundred per cent; yes.

Q. And the record which has been shown you with reference to the percentage of shrimp and oysters canned at the Myrtle Grove Packing Company is accurate, or the correct record?

A. Pretty much so. Very little other than canning is taking place at Myrtle Grove.

Q. In other words, the operations there are just about the same as at the Mavar Shrimp and Oyster Company?

A. Yes, sir.

[82] Q. For all practical purposes it is a canning operation; all the shrimp and oysters are canned?

A. Primarily canning plant; yes.

Q. How long has that been going on at Myrtle Grove?

A. Primarily canning since its opening.

Q. When was it started?

A. It started—I don't recall. It was just about 1946, I believe. About '46 or '47.

The COURT. That is all I have. Do you have any further questions?

Mr. CAMPBELL. Counsel has no further questions.

Plaintiff rests.

Mr. GUICE. We have nothing further, may it please the Court.

The COURT. The defendant rests?

Mr. GUICE. Yes; we rest.

The COURT. The Court would like for each side to file proposed findings of fact and conclusions of law, together with any memorandum either side would like to file to support their findings of fact and conclusions of law. We are running into the Christmas week, so perhaps we should make it by January 11th. Would that be sufficient time?

Mr. GUICE. Yes, sir.

Mr. CAMPBELL. Yes, sir.

The COURT. We will make it January 11th then, and [83] we will mark the matter submitted.

Adjourn Court.

(Whereupon, Court was adjourned.)

* * * *

STATE OF LOUISIANA,
Parish of Orleans:

The undersigned certifies, in his capacity of Official Court Reporter for the United States District Court, Eastern District of Louisiana, the foregoing to be a true and correct transcription of his Stenograph notes taken during the proceedings in the above-numbered and titled case, on the 15th day of December 1953.

New Orleans, Louisiana, this 22d day of January 1954.

(S) Vidal G. Apodaca,
VIDAL G. APODACA,
Official Court Reporter.

[84] *Deposition of Savare De Felice*

Filed October 29, 1952

[Number and title omitted.]

WAGE AND HOUR DIVISION OFFICE,
407 MASONIC TEMPLE BUILDING, NEW ORLEANS, LA.,
Thursday, 23 October 1952.

Met, pursuant to notice, at 10: 00 a. m.

Appearances: Harry Campbell, Jr., Assistant Regional Attorney, 222 Fidelity Building, 1000 Main Street, Dallas, Texas,

on behalf of the Plaintiff. W. L. Guice, First Bank Building, Biloxi, Mississippi, on behalf of the Defendant.

[85] PROCEEDINGS

SAVARE DE FELICE was called as a witness, having been first duly sworn by Ernest R. George, was examined and testified as follows:

Direct examination by Mr. CAMPBELL:

Q. State your name, please, sir.
A. Savare De Felice.

Mr. CAMPBELL. I assume you want to waive signatures on this?

Mr. GUICE. That's right; yes. You want an agreement about the depositions?

Mr. CAMPBELL. Yes. I think we will let the record show that it is taken by oral stipulation, both parties present. All formalities waived.

By Mr. CAMPBELL:

Q. Where do you live?
A. Meadow Grove, Louisiana.
Q. Are you employed by the Myrtle Grove Packing Company?
A. Yes, sir.
Q. What is your position?
A. I am the manager of the plant.
Q. Of the plant. And as manager you are familiar with the operations in the plant?
A. That's right.
[86] Q. What seafood products are handled by the plant at Myrtle Grove?
A. Shrimp and oyster.
Q. Are they handled at the same time during the year, or are there separate seasons for them?
A. Well, you might say separate seasons; but they——
Q. Overlap?
A. Overlap one another.
Q. What is the shrimp season, generally?
A. From August till May, till the end of May.
Q. What is the oyster season?
A. Depending on the weather conditions and other things, it is generally from January till May.
Q. Does the company have its own fishing fleet?
A. Some, not the entire fleet belongs to the company. They have a few.

Q. It has some boats which it operates?
A. Yes.
Q. And then buys shrimp and oysters from independent fishermen?
A. Yes.
Q. About——

Mr. GUICE. I may call this to your attention, as long as we are doing this informally; that you buy them from your own boats.

[87] Mr. CAMPBELL. I was going to develop that in the hearing.

Mr. GUICE. That there is no difference between the independent boat and the company boat, about that.

By Mr. CAMPBELL:

Q. How are the purchases of oysters and shrimp handled from the fishermen? Just explain to us what is done and what action is taken when the boats do come in?
A. Well, the boats, shrimp boats come in, and the shrimp are bought so much a barrel; they are weighed, so much a barrel.
Q. And the oysters are handled about the same way?
A. Well, the sack or the barrel or the can.
Q. Do I understand the system in use with boats owned by the company, they are purchased in the same way, with the owner of the boat?
A. It is the same as an independent boat. I mean, they are treated in the same manner, paid the same scale and bought in the same fashion.
Q. Is there any regularity about the appearance of those boats? Do they have specific times to come in, or they come whenever they are loaded?
A. Whenever—in the shrimp, whenever they have a sufficient load or whenever they have been out long enough; they can't hold the shrimp forever. They got to come in after a certain number of days. Oysters are pretty much the same.

[88] Q. You don't have any fixed time that they deliver either shrimp or oysters?
A. No.
Q. Fixed time of day or fixed time of week?
A. No.
Q. When the shrimp or oysters are unloaded from the boat—take he shrimp first. What is done first after the shrimp are unloaded? What do they do with them?
A. After they are unloaded?
Q. Yes. You have bought them. What is the next step?

A. Well, then, we set them out on the tables, depending on what we are going to do with them, either peel them or break the heads.

Q. Is that done immediately upon their receipt, or how long a period?

A. Well, sometimes it depends on the quantity. If there is enough, we go right ahead. If there are not enough, we'll wait until we'll have enough to go ahead and work.

Q. How are they kept, where you don't have enough to go right ahead with them?

A. We have a place we ice them in the factory.

Q. Now, will you explain for the record here, please, sir, what is meant by peeling shrimp? Just what is done?

A. Peeling is a process of cleaning all the hull, the heads off of the meat, separating, in other words, the head and [89] the hull from the meat.

Mr. CAMPBELL. Let's go off the record just a minute, please.

(Discussion off the record.)

Mr. CAMPBELL. On the record.

By Mr. CAMPBELL:

Q. In other words, when the shrimp are peeled, there is nothing left there except the edible portion of that shrimp?

A. That is the way it is supposed to be.

Q. Now, what is the breaking of the head on the shrimp?

A. Well, it consists of just breaking the heads and leaving the rest of the hull and the meat itself on it.

Q. So you have the type of shrimp you will see in restaurants and bars with the hull and the little tail left on, that has been boiled or picked?

A. Well, this is mostly used——

Q. That's what it looks like?

A. Yes. In other words, just the shrimp with the head off, but the rest of the hull on.

Q. Now, what is the next process with the peeled shrimp?

A. Well, it depends on the disposition to be made of the shrimp.

Q. That is, whether it is to be sold fresh or frozen or canned?

A. That's right.

[90] Q. All right, sir. Is there any substantial difference in the processes used in handling it as fresh shrimp or frozen shrimp, aside from freezing itself?

A. No; that is pretty much the same.

Mr. GUICE. May I bring this to your attention just to try to bring out the facts:

Shrimp are handled in three different ways. There is a shrimp with the peeling on it, is frozen, in packages. The rea-

son you see them on the bars, they buy them in packages and boil them or you can peel them and boil them, anything you want to do with them.

Then the shrimp which have been hulled or peeled, divided into two other modes of being merchandised. In one case they are put in cans, hermetically sealed cans and go through a process, as we contend. In the other case, they are cooked and put in an ordinary can which is kept frozen, when it goes to the hotel or whatever. They call that cook-peel. That is not hermetically sealed cans.

By Mr. CAMPBELL:

Q. Now, after taking up the peeled shrimp first, if that is going to be canned, hermetically sealed, what is the next step after the peeling?

A. After the peeling they are put in flumes.

Q. Beg pardon.

A. Put in flumes that float, in other words—it also [91] serves as a washing for the meat, see. They are floated to a belt, inspection belt, where they are inspected, see if there is any bad shrimp or any hulls on them, and then they are placed in tubs, containers, about 10-pound containers, and they are allowed to accumulate then until you have enough for a cook, in other words, enough to cook.

Q. About how long does it take the peeled shrimp—let me go back a moment. How long does it take after the shrimp are put on the table before it is peeled and ready for that washing process?

A. Well, that depends entirely on the size of the shrimp and the number of pickers we have, see. It varies.

Q. Normally, does it run pretty well through——

A. Say 20 minutes to a half hour before they start coming out in enough quantities, you know.

Q. How long does the washing and inspecting process last?

A. That is, I'd say, five minutes.

Q. After washing and inspecting, are they then put in the cans direct?

A. No; they have to be cooked. If they are going to be canned, they have to be precooked.

Q. And what does that precooking consist of?

A. Well, that is cooked for approximately three minutes, and then they are taken out of that tank, that blanching tank, [92] and run in another belt where they have further inspection. Then that goes into a grader where the shrimp are systematically graded, different sizes, jumbo, large, medium, small, and the broken shrimp, pieces, and this grader head drops the

shrimp into trays under each respective grader, you know, and then they are set in these trays.

Q. How long do they remain in the trays?

A. Well, that too depends on the volume of shrimp coming in. If they are coming in slowly, they will stay as long as two hours before the actual packing begins. If they are coming in fast, they must start sooner, in other words.

Q. They are packed whenever you have enough to pack?

A. That's right. We hold them as long as two, three hours before we start packing.

Q. Where does the Pure Food and Health inspector examine them, what time?

A. Well, from the time they open the boats until they leave the plants.

Q. All the way through?

A. Yes; complete operation.

Q. When you have enough shrimp in those trays to pack, tell us how that is done.

A. Well, then, the packing room crew starts to—they go through the shrimp to make sure that there is no hulls at all left, and then they pack them according to the grades, [93] separate grades at a separate time, different time.

Q. That is all done by hand?

A. Well——

Q. Packing?

A. The only thing done by hand is actually weighing of the shrimp in the cans, and then they are put on a belt, and then it is automatic from then.

Q. The cans are sealed automatically?

A. That's right.

Q. They go through further cooking?

A. Yes.

Q. That is sort of a pasteurization process?

A. That's right.

Q. How long is that? How long does that require?

A. Well, they are cooked approximately 13 minutes, but then too they let them accumulate until they have enough to cook in one batch, see, three kettles; in other words, in one process. That takes from 20 minutes to 30 minutes, I imagine.

Q. After the sterilization and the cans are sealed and sterilized, then they are ready for labeling and——

A. Casing.

Q. Boxing; casing. How long would you say, Mr. De Felice, under normal circumstances, would an average flow of shrimp into the plant, would that total process take?

A. Just what are you referring to?

[94] Q. From the time that they are placed on the tables until they are in the cans and sterilized.

A. Do you mean take one shrimp?

Q. The normal flow through the plant.

Mr. GUICE. From the time they are cooked and placed on the table until they are sterilized.

Mr. CAMPBELL. From the time they are placed on the table for peeling.

Mr. GUICE. Well, now, we want to object to his use of the word "process" as leading the witness and tending to influence his judgment as to what happened, insomuch as our defense in the matter is that it is not one process, but it is two processes: First, the process which takes place initially with the picking and washing and weighing and so forth of the shrimp, in order to pay the pickers, and then the second and more complicated process of actual canning, the same being performed in different compartments and under different times and under different circumstances.

I just wanted to put that in the record.

Mr. CAMPBELL. That is all right. I will try to rephrase the question to take the word "processing" out.

Mr. GUICE. That is all right, because that is our lawsuit.

By Mr. CAMPBELL:

Q. How long does it take, with a normal flow of shrimp, [95] from the time the shrimp is dumped out on the table for peeling until the can has been sealed and sterilized? I am just asking about an average time now, average circumstances.

Mr. GUICE. It is all right to answer that.

A. In other words, you mean, say, take this——

Mr. GUICE. What he wants to know—if you will allow me, because it is informal—he wants to know from the time you bring the shrimp in the baskets and put them on the picking table, from that time until finally the processing, the last processing in the kettle is completed.

The WITNESS. That would take——

Mr. GUICE. Of the ordinary average batch of shrimp.

The WITNESS. I'd say at least an hour and 15 minutes. It still depends, I mean, we'll say——

By Mr. CAMPBELL:

Q. That time is variable on the size of the shrimp, the number of shrimp you have to process, the number of pickers you have available and everything else?

A. Yes, but ordinarily, I would say, everything running normally, I believe that's what it would take.

Q. Now, the peeled shrimp that are going to be placed in the nonhermetically sealed cans or jars—by the way, which is it, placed in cans or jars?

Mr. GUICE. They are put in cans.

A. The cans, waxed paper boxes.

[96] BY Mr. CAMPBELL:

Q. What is the first thing done after they are peeled when you are going to process them in that manner?

A. If they are going to be sold as cook-peeled, why, they go the same process up till the actual—go the same process, in other words, they are cooked.

Q. They are washed and inspected?

A. That's right, the same.

Q. Blanched?

A. And blanched, and then they are graded the same; then instead of it being put in cans, they are put in other types of containers, a bigger can or waxed paper boxes or waxed bags or some wax containers.

Q. And then are frozen?

A. Then eventually they are frozen, but they can be sold under refrig——

Q. Refrigerator or frozen in that condition?

A. Yes.

Q. About how long would it take, under the same normal circumstances, to process that shrimp through or to put it through all these processes, where it is going to be sold as cook-peeled shrimp?

A. Not quite an hour.

Q. There again that is subject to variation because of the shrimp, the size, and the number of people you have?

[97] A. Yes.

Q. Now, do you freeze any of that cook-peeled shrimp at your plant?

A. Not right at the plant, no.

Q. Where is that done?

A. It is done mostly in New Orleans, I imagine. See, we sell to a broker and he in turn——

Q. So far as Myrtle Grove Packing Company——

A. We don't have the freezer.

Q. That is sent out as unfrozen, refrigerated but unfrozen shrimp?

A. That's right.

(Discussion off the record.)

By Mr. CAMPBELL:

Q. You are familiar with your answers to the interrogatories that you signed in this case?

A. Yes.

Q. Let's look at Interrogatory 9 (a). This peeled cooked shrimp, sales of it would be included in the sales in that first column there, is that correct, covering gross sales of fresh shrimp and oysters?

A. The fresh shrimp, you say? Yes.

Q. That is included in that?

A. Yes.

Q. Now, taking the shrimp that has had its head broken, [98] what is the first process after that breaking has occurred?

A. Well, they are washed and checked for the size. They are weighed.

Q. They are washed in the same manner as the peeled shrimp?

A. Yes.

Q. Floated?

A. Floated, yes.

Q. And checked for size and inspected, of course?

A. Yes, inspected. But I mean checked for size, that is strictly—it is different. I mean, it is a different operation than the other one. See, in other words, you just take a count to see what—they are sold by count, different size, so much to a pound at a certain price, so they just count to determine what size they are in, how many run to a pound. That's how they are bought.

Q. Will your shrimp out of a given purchase run pretty consistent in size?

A. Well, this type shrimp, yes, all uniform, mostly.

Q. All right, sir. After they are washed and graded and inspected, what is the next process?

A. Then they are put in ice in boxes, a hundred pounds of shrimp to the box.

Q. And then they are ready for sale?

A. Then they are ready for shipment.

[99] Q. Are your sales then of the shrimp in the hull also included in the figure shown in that first column to the answer to the Interrogatory 9 (a)?

A. You mean the headless?

Q. Yes, sir.

A. Yes. Headless shrimp included in there too.

Q. So that figure will include both that shrimp that has had the head broken and the shrimp that has been peeled?

A. That's right.

Q. And sold as cooked peeled shrimp. All right, sir.

Now, those are the only two ways in which you handle—the only three ways in which you handle the shrimp at your plant, with the head broken, cook-peeled shrimp, or canned?

A. Up to now. But there is other ways it can be handled.

Q. I am talking about up to now.

A. So far that is all we have been doing.

Q. Now, turning to the oysters, let's take those through the same way. What is the first thing done with the oysters after they are unloaded?

A. They are unloaded and steamed. They are steamed.

Q. Is that in preparation for opening them?

A. Yes. In other words, they are steamed; after they are steamed for a while, they are partially open to make it easier for extracting the meat, in other words, getting the meat out of the shell.

[100] Q. How long does that steaming take?

A. Well, it varies with different oysters; anywhere from three to—no, wait a minute; from five to nine minutes' steaming.

Q. Then they are ready to be opened?

A. Yes.

Q. Are they dumped out on tables in the same manner as shrimp are?

A. No; they are placed in big tubs, you might call them, and after they steam they are set out on the track in the same container, same tub, and then when they have a line filled, they start shucking them.

Q. All right. What is done after they are shucked?

A. After they are shucked, they shuck in small cans; they have the can filled. They come in a station and weigh their meat, and they are paid there, and then they return to go back to shucking again, and then this other party takes the shucked meat, the oyster meat, and dumps it in a tub, where they are washed, and floated into another room, where they go on an inspection belt, and from that belt they go into a tank with a brine solution, where they are salted, and from there they go on another belt, where they are further inspected, and then into trays, similar trays that the shrimp are put into.

They are, oh, maybe, 25 pounds of meat, in other [101] words, and then they are set on tables in the packing room.

Q. Are your oysters all packed or do you sell some fresh?

A. Sell some fresh.

Q. Are they cooked further before they are packed?

A. You mean in the cans?

Q. Before they are put in the can?

A. No.

Q. In other words, you pack those in the can and cook them in the can?

A. They are cooked after they are in the cans.

Q. Is that just a sterilization cooking?

A. That's a further cook, also.

Q. And when that is completed, is the can sealed before that?

A. The can is sealed before they are cooked.

Q. When the cooking is over with, why, they are ready for labeling and crating?

A. Yes.

Q. Again, taking the normal circumstances, Mr. De Felice, how long would it take for a representative batch of oysters to go through the final cooking?

A. Well——

Mr. GUICE. Do you mean from the time——

Mr. CAMPBELL. Off the record.

[102] (Discussion off the record.)

A. That depends on the size of the oyster. But normal, say medium size, that is in the cans?

Q. Yes; and cooked.

A. It would be close to two hours, maybe a little more than two hours.

Q. How long is that final cooking?

A. That is 13 minutes.

Q. Now, when you sell any frozen oysters or oysters in a condition similar to the cook-peeled shrimp——

Mr. GUICE. I may say this to you: that we are not handling that at all.

By Mr. CAMPBELL:

Q. How are your oysters that aren't canned sold?

A. Well, either sold in the shell or shucked, sold as fresh.

Q. Now, is this included in the answer to Interrogatory 9 (a) in the first column, any oysters sold in the shell?

A. Yes.

Q. In other words, that would include oysters sold in the shell or oysters sold shucked?

A. That's right.

Q. Fresh. Now, to recapitulate, you have a situation of sealing canned oysters or oysters in the shell or shucked oysters sold fresh. They are refrigerated but not frozen?

[103] A. That's correct.

Q. You sell shrimp in the can hermetically sealed, fresh peeled shrimp, which has to be kept under refrigeration, but not frozen in your plant?

A. Yes.

Q. And then the fresh shrimp with the heads broken off; those are the three ways you handle that, is that correct?

A. Now, let me say this: Myself, I have been there only one year, and I don't know before, I mean, if they breaded shrimp or deveined them—some of them is deveined, or oysters, either. I don't know about that. I am talking about——

Q. About the time you have been there?

A. Since I have been there.

Q. And you came there when?

A. I came in October 1951, just about a year ago.

Q. Now, to go back again a little further, I wish you would describe the equipment in each of these departments of the business. In other words, take the shrimp. It is a matter of hand work; the shrimp are dumped out on large tables where the pickers can reach it, is that correct, and I believe you said they were washed in flues. You mean——

A. Flumes.

Q. Running streams of water?

A. Yes.

Q. Where they are floated down.

[104] A. It serves two purposes, transport the shrimp and at the same time wash them. They are floated in this steady stream of water.

Q. What equipment do you use in blanching the shrimp?

A. There is a blanching tank.

Q. That is a boiling process?

A. Yes; in other words, it is a tank with a coil in it, and with baskets in the tank, and the shrimp are placed in the basket. There you have your salt and everything added in that water.

Q. Just lowered into this boiling salt water in a big tank?

A. That's right, and at the end of the cooking, whatever period of cooking it is, they hoist it out with a hoist and dump on a conveyor, which carried them over to the grader, and so forth.

Q. It goes from there, I believe you said, to the classification?

A. Well, it goes on a belt, and then from there it goes to that grader.

Q. That is a machine process, is it, shakes the shrimp through holes according to size?

A. Yes.

Q. Dropped down into these trays. Are they packed in the cans from the trays by hand or is that automatic?

[105] A. They are placed in the can by hand. They have to weigh——

Mr. GUICE. They have to weigh every can. Some of them have a quarter of an ounce left, or anything. They haven't devised any method of getting out that proper weight. They could probably, but it is too expensive.

By Mr. CAMPBELL:

Q. It is all automatic from there on, sealing and the cooking?

A. That's right.

Mr. GUICE. The cooking is——

Q. It goes right on through the line?

Mr. GUICE. No. I'll say this—you can ask him—it comes to a point where they are sealed and put in baskets, round baskets, and those baskets are hoisted up and lowered into the processing kettles.

By Mr. CAMPBELL:

Q. Is that final processing tank also a matter of boiling water, a tank of boiling water?

A. No, this is steam.

Q. What temperature is used on that?

(Discussion off the record.)

A. It is 120, I believe. I don't know.

Q. Might be 120 Centigrade; have to be over boiling.

(Discussion off the record.)

[106] By Mr. CAMPBELL:

Q. In the oysters, after they are shucked and washed, are they graded for size too, I believe you said?

A. No.

Q. They are not graded for size?

A. No.

Q. Are they packed by hand or by machine?

A. They are packed—they are put in the cans, similar fashion as the shrimp. They are weighed in the can. Then the machinery——

Q. Machinery seals the can?

A. Yes.

Q. They get that final cooking in the same way as the shrimp?

A. That's right.

Mr. CAMPBELL. Off the record.

(Discussion off the record.)

Mr. CAMPBELL. On the record.

By Mr. CAMPBELL:

Q. The plant does have refrigeration facilities there, I assume, both to keep the shrimp and oysters before anything is done to them, while you are waiting for enough to work on, and to keep the fresh shrimp and oysters prior to their shipment; is that correct?

A. Well, the oyster, before we do anything to them, [107] nature refrigerates them.

Q. Oysters don't have to be refrigerated before they are shucked?

A. The fisherman's responsibility, see; so is shrimp.

Q. I was thinking after they were bought; you didn't have enough to start working on.

Mr. GUICE. Take this off the record.

(Discussion off the record.)

By Mr. CAMPBELL:

Q. Tell me, then, for the record, whether it is necessary to refrigerate oysters after they are purchased from the fishermen, where you don't have enough to start processing them immediately?

A. See, the thing, oysters, we don't buy them before we start. I mean, it is not like shrimp. Usually, oysters is a big enough load that if it does come, we'll have enough to work.

Q. All right, sir. What do you do with the shrimp when you don't have a big enough supply to start work on them at once?

A. I ice them down in a room in the plant.

Q. You have a room set aside for that purpose?

A. Yes.

Q. Do you make your own ice or purchase it?

A. Buy the ice.

[108] Q. All right. Now, where you sell the oysters in the shell, how long do you ordinarily keep those before you move them out?

A. That depends on the kind of market, anywhere from two to four days.

Q. And are they refrigerated at any time during that period?

A. No.

Q. On your fresh oysters, the ones that have been shucked, do you have to refrigerate those?

A. Yes.

Q. They are iced down?

A. They are refrigerated.

Q. In the containers?

A. Yes.

Q. You have a storage room for that purpose?

A. Well, it is not exactly a storage room. See, we generally ship them out within a few hours or soon enough that we don't have to hold them.

Q. Now, on your cook-peeled shrimp, are they iced down, pending shipment?

A. In the container they are.

Q. And how often do you ship those; I mean, how soon do you ship those after you have got them in the containers?

A. Well, you can—generally, that same afternoon. [109] But it doesn't have to—it is to our advantage to ship them as soon as we can.

Q. That would be true on the headed shrimp too?

A. Yes, as soon as we can sell them, the better off we are. I mean, that's what we want to try to do.

Q. Do you try to have orders for those fresh and headed shrimp, and fresh peeled shrimp before you process those?

A. It is more or less something that comes in at the same time; either you have the order and you have to have the merchandise there—I mean, it works hand in hand.

Q. That is not on a prior-order basis?

A. Some are, but sometimes production is unpredictable. You might book an order and then not get the merchandise, to be able to fill the order out. So, in other words, you more or less sell them as you get them.

Q. When your shrimp or oysters are ready for shipment, whether fresh or canned, they are loaded out there at your plant?

A. Yes.

Q. It is my understanding—I'd like to have you verify if it is correct—that practically all of the canned oysters, shrimp and oysters, are sent over there to Biloxi to Mavar Packing Plant, is that correct?

A. Well, the greatest portion of them is sent to DeJean and Mavar.

[110] Q. Those are in Biloxi?

A. Both in Biloxi.

Q. Do you have facilities there for labeling the cans?

A. We have, but we haven't labeled since I am there.

Q. They are just packed in containers for shipment, to be labeled later, is that correct?

A. That's right.

Q. What size containers do you use, what size cans?

A. Four and a half and five ounces.

Q. You don't ship in large commercial size cans then?

A. No.

Q. For hotel and restaurant use?

A. Not that type; no.

Q. Is that transportation by truck?

A. Truck; yes, sir.

Q. Now, how about the fresh or the cook-peeled shrimp and the fresh oysters; how are they shipped?

A. Truck.

Q. Not refrigerated trucks?

A. They have ice.

Q. Do any of those go to Biloxi?

A. No; most in town here, New Orleans.

Q. Here at New Orleans. What trucks do you use, company trucks or common carrier, contract carrier, or what?

A. We use company truck and contract carriers, and [111] sometimes the buyer sends his own truck.

Q. Does the company have a refrigerated truck?

A. Not automatic, I mean—no, sir.

Q. So if you are going to ship in a refrigerated truck, it would be through the buyer or——

A. No. You see, we can refrigerate by using ice. I mean, that's what most of them have, regular.

Q. In other words, you pack the containers in ice?

A. That's right.

Q. In crates?

A. Use ice. Then the truck is closed. It is not automatically refrigerated by machine though.

Q. Do you use any aluminum sulphate or other chemical to help preserve the shrimp and oysters in canning?

A. No.

Q. You use nothing except brine?

A. Salt.

Q. Salt water in the cooking and canning.

Is it true that the handling of the peeled shrimp, whether it is going to be canned or sold as cook-peeled shrimp, is the same up to the time it goes through the grader for separation according to size?

A. Cooked-peel?

Q. Yes.

A. And canned? Yes.

[112] Q. It is at that point where part of it goes into cans and part of it into these unsealed cans or containers?

A. That's right, after they have been cooked.

Mr. CAMPBELL. Off the record.

(Discussion off the record.)

Mr. CAMPBELL. On the record.

By Mr. CAMPBELL:

Q. What size containers do you use in shipping your cook-peeled shrimp?

A. It varies, mostly five-pound containers.

Q. Might refer to them as commercial containers for restaurants and hotels and so forth?

A. Yes.

Q. Is that true about your fresh oysters?

A. Well, gallon.

Q. And they are sold primarily for the use of restaurants and hotels?

A. Yes.

Mr. CAMPBELL. I understand you wish to reserve your right to cross-examine?

Mr. GUICE. That's right. I don't want to cross-examine him until I sort of see what you have brought out.

Mr. CAMPBELL. Well, let the record show then, Miss Reporter, that it is agreed that at a date to be agreed on between the parties that Mr. Guice will have a right to continue [113] the examination of this witness.

(Discussion off the record.)

Mr. CAMPBELL. That is all.

(Witness excused.)

[114] CERTIFICATE

This is to certify that the attached proceedings before the U. S. Department of Labor in the matter of:

Agency: U. S. Department of Labor.

Title of Officer: Harry Campbell, Jr., Assistant Regional Attorney.

Name of case: *Tobin* v. *Myrtle Grove Packing Company.*

Docket No. 3392.

Place: New Orleans, Louisiana.

Date: 23 October 1952.

were held as herein appears, and that this is the original transcript thereof for the files of the Department of Labor.

ACE REPORTING CO.,
(*Official Reporters.*)

By (S) Miriam E. Polk.
MIRIAM E. POLK.

[115] *Deposition of Nick Mavar*

Filed January 11, 1952

[Number and title omitted.]

Appearances: Harry Campbell, Jr., Assistant Regional Attorney, 222 Fidelity Building, 1000 Main Street, Dallas, Texas, on behalf of the Plaintiff. W. L. Guice, First Bank Building, Biloxi, Mississippi, on behalf of the Defendant.

* * * * *

Reporters transcript of depositions taken in the above styled [116] and numbered causes, in the offices of W. L. Guice, Biloxi, Mississippi, on December 9, 1952.

* * * * *

By Mr. GUICE. Style—*Maurice G. Tobin, Secretary of Labor, United States Department of Labor, Plaintiff* v. *Myrtle Grove*

Packing Company, a Corporation, Defendant; being cause number 3392, Civil, on the docket of the United States District Court for the Eastern District of Louisiana.

Appearances: Harry Campbell, Jr., Assistant Regional Attorney, 222 Fidelity Building, 1000 Main Street, Dallas, Texas, on behalf of the Plaintiff; W. L. Guice, First Bank Building, Biloxi, Mississippi, on behalf of the Defendant.

Testimony taken today by agreement of both the Plaintiff and the Defendant, is without notice and subject to objections by both parties on the trial of this cause for relevancy and competency. The witnesses appearing have all been sworn in accordance with the laws of the State of Mississippi.

[117] Mr. NICK MAVAR, was thereupon called as a witness, having been first duly sworn, testified as follows:

Direct examination by Mr. GUICE:

Q. What is your name and place of residence, Mr. Mavar?
A. Nick Mavar, Biloxi, Mississippi.
Q. How old are you?
A. Thirty-eight.
Q. Are you a native of Biloxi?
A. Yes, sir.
Q. What education have you had?
A. I finished college.
Q. University of Mississippi?
A. University of Mississippi.
Q. Are you now connected with the Mavar Shrimp and Oyster Company, Limited?
A. Yes, sir.
Q. In what capacity?
A. Partner.
Q. Are you connected in anywise with the defendant, Myrtle Grove Packing Company?
A. Yes, sir.
Q. In what capacity?
[118] A. I am an officer in the Corporation.
Q. What officer?
A. Secretary.

By Mr. CAMPBELL:

No—Vice President?

By the WITNESS:

Vice President.

By Mr. GUICE (continuing):

Q. Vice President?
A. Vice President.

Q. How long had the Myrtle Grove Packing Company been in existence?

A. About five years.

Q. About five years. Now, are you, from having visited the plant of the Myrtle Grove Packing Company, and having had authority with reference to its manner of operation—familiar with the operations generally, of the Myrtle Grove Packing Company?

A. Yes, sir.

Q. Are you likewise familiar with the operations of the Mavar Shrimp and Oyster Company of Biloxi, Mississippi, and the Williams Navigation Company, which were the two Companies—the plaintiffs in the litigation which afterwards went to the Circuit Court of Appeals under the style of *Donnely* v. *Mavar Shrimp and Oyster Company?*

A. Yes, sir.

[119] By Mr. GUICE (to Mr. Campbell). Have you got the citation of that?

By Mr. CAMPBELL. I haven't got the citation, but I can give you the number. The number is—I'll have to get it.

By Mr. GUICE. All right. It is agreed that the case referred to was number blank on the docket of the Circuit Court of Appeals for the Fifth District. Is that right, Mr. Campbell?

By Mr. CAMPBELL. Yes; that's right.

By Mr. GUICE (continuing):

Q. Is there any difference—material difference—in the manner of the operation of these plants; that is the one at Myrtle Grove Packing Company, and the one at Biloxi?

A. No.

Q. Are the shrimp and oysters generally handled the same, except that the percentage of raw shrimp shipped at Biloxi is greater?

A. That's right.

Q. Now, Mr. Mavar, in handling shrimp at Myrtle Grove, you buy these shrimp at your dock from the boatmen who catch them in the Gulf and in the Bays of that part of Louisiana?

A. That's right.

Q. They are then, or at the time, of your purchase [120] weighed so as to pay the prevailing price to the boatmen?

A. That's right.

Q Are they bought on what is called the open market; that is a competitive market?

A. Yes, sir.

Q. That is, you pay the same price that other people are willing to offer for the shrimp?

A. That's right.

Q. If you didn't pay that, why the shrimp would be sold to other people, is that right?

A. That's right.

Q. Now, when these shrimp are caught, are they always caught in large quantities, or, on some occasions, is it necessary for you to wait several days before you secure enough shrimp to pack?

A. They are caught in large quantities, and also are very scarce at times, and it takes quite—it takes a few days to get enough to run the plant.

Q. Now, on the occasions where it takes a few days to get enough for operation at your plant, how are these shrimp protected from spoilage at your place?

A. They are stored with crushed ice.

Q. That's the way they are stored in the boat?

A. That's right.

Q They will keep for approximately how long that [121] way?

A. Oh—five or six days—seven days, depending on the kind of shrimp and how well they are taken care of.

Q. Now, after you start the operation of your place, these shrimp undergo—according to your statement in the Mavar case—several processes before the final—or process of canning is completed. Is that right?

A. Yes, sir.

Q. Now, the shrimp, when they come into the plant and are either immediately placed on tables, or, are iced down for future use, have the heads and claws and other impediments—other than the tail which is edible—on the shrimp. Is that right?

A. Yes, sir.

Q. Now, in order to make the shrimp possible for either canning, or for shipment raw, or for cooking and putting in cans not hermetically sealed, it is necessary for the shrimp to undergo—state whether or not it is necessary for the shrimp to undergo an initial process for the removal of all the parts which are not sold.

A. Yes, sir.

Q. Now, is that a separate process from the process of canning?

By Mr. CAMPBELL. For the record, I want to make an [122] objection that it is evading the providence of the Court.

By Mr. GUICE (continuing).

Q. Has it always been considered, from your earliest knowledge, as a child, of the shrimp and oyster business, that that

is a separate and distinct process that can be carried on anywhere, without reference to the place where the canning is done?

A. Yes, sir.

Q. You were raised up in the shrimp and oyster business in Biloxi, weren't you?

A. Yes, sir.

Q. How old are you now?

A. Thirty-eight.

Q. When was the first—about the first time you knew anything about it?

A. Oh—twelve or fourteen years old.

Q. You worked in the factory as a boy, picking shrimp, didn't you?

A. Oh, yes—that's right—yes, sir.

Q. And are you familiar with both Louisiana and Mississippi, with the general outline of canning shrimp and oysters?

A. Yes, sir.

[123] Q. For years, at Biloxi, and one of the very pioneers in this business, there was a firm known as Dunbar Dukate. Is that correct?

A. Yes, sir.

Q. About how far from their canning plant was located their picking sheds and processing plant for oysters and shrimp?

A. Very near a quarter of a mile.

Q. In other words, state whether or not millions and millions of cans of them there were picked at one place, and canned at another.

A. A tremendous operation.

Q. Now, have you known of, in your experience in the canning business, of both oysters and shrimp being picked at one place and canned at another?

A. Yes.

Q. Well, state whether or not, as a matter of actual fact, if both oysters and shrimp processed by being picked and cooked, upon the completion of that process, would be a merchantable product that could be sold to other people for cash?

A. Yes, sir.

Q. Now, in the case of oysters—your oysters are brought by luggers and unloaded in your dock. Is that correct?

[124] A. That's right.

Q. In Biloxi, I think you put these oysters in cars and process them in drums. Is that correct?

A. Process them in the steam box.

Q. That is what I say—drums or steam box.

A. Yes.

Q. Now, you don't use that system at Myrtle Grove, do you?
A. A little different—no!
Q. Well, what is the system you use there?
A. We unload them in baskets and process them in regular retort kettles.
Q. Now, by processing that—you mean you cook them in that retort kettle?
A. That's right.
Q. Then after you cook them in the retort kettle, what becomes of them?
A. They are taken out the kettles and put along in the shucking shed, where the people go there and complete that process of shucking.
Q. And when they shuck them, the edible oyster meat is then placed in cans, and the shells are thrown away as a byproduct?
A. They are put into their pails——
Q. That is what I say—it is put into a pail.
[125] A. That's right.
Q. Which is afterwards weighed?
A. That's right.
Q. And the shells are byproducts?
A. That's right.
Q. Now, the shells have some value as a byproduct?
A. Yes, sir.
Q. In other words, state whether or not the oysters come in and are cooked in this kettle, and then placed in a position to where they can be opened so that the meat can be taken from them; and from that process, there comes two things; the oyster meat, which has a salable value, and the oyster shell, which likewise has a salable value?
A. Yes, sir.
Q. Now the meat then, after it is put in what you term the bucket, is weighed. Is that correct?
A. Yes.
Q. Now, up to the time that it is weighed, is that meat, or any part of those oysters your property, or whose property is it?
A. The property of the fisherman—the boatman.
Q. In other words—you buy the meat?
A. That's right.
Q. Is that correct?
A. That's right.
[126] Q. When the boat comes on to the wharf, the boatmen who have charge of the boat catching these oysters, own the oysters?

A. That's right.
Q. Is that correct?
A. Yes, sir.
Q. They make a bargain with you for the sale of their oysters by the yield of the oysters per barrel in meat?
A. That's right—yes.
Q. And during the entire process, up to the time when this meat is weighed—state whether or not the oyster remains the property of the boatmen.
A. It is his property.
Q. If he wanted to he could take it back?
A. Yes.
Q. And it is only after they are weighed that the meat becomes your property?
A. It's after they are canned that they become our property.
Q. After they are canned?
A. The oysters come in the plant and they are shucked and bought from him on the yield basis—and depending on how much meat that those oysters will turn out. And if he brings us poor oysters, he doesn't get much money—if he brings us fat oysters that will yield plenty, he will get [127] a good return for his load.
Q. Now, when they are placed—when they are weighed, then is that meat then packed in cans immediately, or does it go into a separate part of your establishment and go through a separate and distinct process before it is canned?
A. It goes into the packing room and is passed through washes to remove grit and shells——
Q. What I mean—what I mean, is it necessary that you do it in that packing room, or could you do it in the packing room a hundred miles away from there?
A. No; you could take it anywhere and do it.
Q. Is it a separate operation?
A. Absolutely separate.
Q. Does it—state whether or not it starts with the washing of the oyster meat, so as to exclude from it all foreign matter, and continues through a half a dozen processes, or half a dozen operations, until finally this meat is processed and canned?
A. That's right.
Q. And it is only when it is processed in a can that it is canned?
A. That's right.
Q. Then it is actually—state whether or not the actual canning of the oyster meat, as well as the shrimp meat, commences when it is introduced into the canning pro-[128]cessing room?

A. That's right.

Q. And before that it can be taken out and disposed of in a half a dozen other methods?

A. Sure.

Q. Is that correct?

A. Sure.

Q. Now, I think in the operations of this business, that the workmen who do not work on a fixed hourly scale, operate on a basis of wages which is really determined by the Unions at Biloxi—is that correct?

A. In Biloxi; yes.

Q. Well, now, is there much difference between the pay at Myrtle Grove and the pay at Biloxi—I mean as far as those engaged in the processing—the initial processing where shrimp and oysters are concerned?

A. I think it is pretty much the same.

Q. It is on an hourly basis? I mean it is on a piece basis—you might say?

A. Sure.

Q. You pay so much for so many pounds of meat of shrimp?

A. That's right.

Q. Now, you measure, I think, the shrimp—the amount of shrimp that you have, by the amount of hulls left?

[129] A. That's right.

Q. But in the case of oysters, you pay according to the weight of the oysters?

A. Oyster meat.

Q. Now, does the earning power of the various workers in this initial processing vary according to the skill of the individual worker?

A. Yes.

Q. Now, in the past, has there been any objection on the part of these workers——

By Mr. GUICE (to Mr. Campbell). I reckon you won't object to this?

By Mr. GUICE (continuing):

Q. To working under the system you have adopted there?

A. No.

Q. Are they satisfied with it?

A. To my knowledge, they are satisfied.

Q. Would they rather have it than to be placed upon an hourly basis?

A. In my opinion, they would rather have it.

Q. Why?

A. Because quite a few could earn more than the hourly rate, and some of them would not be satisfied to work [130] for

seventy-five cents an hour when they are earning more than seventy-five cents, and the other person alongside of them getting the same rate of pay they get.

Q. Well, now, what governs their ability to earn?

A. Their ability to work.

Q. Now, what is that governed by? Their age—skill, or what?

A. Skill—I would say.

Q. Well, we will take, for instance at Myrtle Grove, we will say that you have a hundred workers there—about what will the lowest worker—per day—make?

A. Well, that would vary—the size of the shrimp—the size of the oyster——

Q. Well, on an average size shrimp and an average yield oyster, we will say—that they work four hours in a day—how much would they make? I mean the lowest one?

A. I wouldn't know——

Q. Well, would you give us the——

A. The lowest one wouldn't make less than seventy-five cents an hour.

Q. Well, the highest one what would—how much would the highest one make?

A. They would go up—way up—hell, the fast ones go up to a dollar and a half to two dollars an hour.

Q. Well, would you say that among the group of [131] people working for you at Myrtle Grove—because of the age, disability of some, and the youth and ability and skill of another—that, taking a hundred as a basis—say—that some earn slightly under a hundred and some would earn as much as three hundred. Percentages, I am talking about.

A. I don't understand your question.

Q. Taking your employees as a whole, and considering their age, their disability, their skill, and so forth—would some make as much as three times as much as the others in an hour—or in a day?

A. Yes; I would think so.

Q. Then you do—then some of your workers do earn as high as a dollar and a half an hour?

A. Oh, yes—sure.

Q. And some of them earn as low as fifty cents an hour?

A. Sure.

Q. Well now is that—as I have asked you before, due to the age of the person—their lack of skill—their slowness of movement, and so forth?

A. That's right.

Q. Now, we have stated in our depositions, in answer to the interrogatories addressed to us, that a great many of our employees would be unable to get work in—under ordinary competitive systems, because of the age and dis[132]abilities—is that true?

A. That's true.

Q. You do afford work for those people?

A. Yes, sir—we work them.

Q. But could you afford as an economic matter—as an economic principle, to hire these people on an hourly basis?

A. No, sir—we would have to weed them out.

Q. And that would mean what—if you weeded them out?

A. Well, it would mean that we would have less people working in our factory, and these people would be a burden on the community.

Q. In other words, the incompetent ones, and the old ones, and those physically disabled would be unable to work in your factory?

A. That's right.

Q. And they would either have to seek some other kind of work that would pay less than seventy-five cents an hour, or become public charges?

A. That's right.

Q. Now, with reference to oysters, Mr. Mavar, state whether or not oysters could be brought to your packing shed and left there for two or three days before they were opened?

A. Brought in a boat?

[133] Q. Yes.

A. Oh, yes.

Q. Now, considering when the oysters ordinarily are lifted on to your docks from the boat, about how long a time would elapse before those oysters which were lifted in a basket from your boat was finally—after your ordinary operations, be put in your packing room, as having been canned?

A. A couple of hours.

Q. A couple of hours—that is where it goes from your room to your canning room?

A. To the supply room.

Q. Now, do you pay the persons engaged in canning seventy-five cents an hour?

A. Yes, sir.

Q. Or more?

A. Seventy-five or more cents an hour—yes.

Q. You've done that since the—before the law was in?

A. Oh, yes.

Q. They wholly obey the law on that?

A. Oh, yes.

Q. But it is your contention that the first operation of picking and shucking is a separate process?

A. Yes, sir.

Q. Do you think, as a matter of economic fact, under [134] the present competitive conditions, that the canning industry—with the prospects that it has of competition from many foreign lands—could be successful if they had to engage those who process initially shrimp and oysters—on an hourly basis?

A. No, sir. It would force us to machinery. We would have to go to machines.

Q. You tried that in your plant here, did you?

A. Yes, sir—and we can't make it.

Q. About how much would it cost you a month, just to keep your records?

A. We tried to keep the records there—and we had—let's see—we had two people—steady.

Q. Well, state whether or not you were able to keep them successfully then?

A. No; we couldn't keep them.

Q. Now, will you tell the Court whether or not the people who work in a shrimp and oyster factory are a perambulating race of employee—that is; that they walk in and work for an hour, and walk out and stay out a half an hour, and come back and work for half an hour, and go out and work for an hour, and then go home and cook something, and then come back and work some more.

A. That has been the history of the industry, and common amongst the people for years.

[135] Q. Can you control that?

A. No. So many of the people we have working at the factory are housewives, and they have children and come back and forth, and they come and go as they please. They have no——

Q. Upon any formula that you've seen, adopted by the Labor Department—with reference to absences, and so forth could you keep any record of how long they worked, under the conditions that they do presently work?

A. Not feasibly so.

Q. Well, state whether or not they are so firmly attached to their own way of doing this work that you would be unable to break them from their habits?

A. It would be a mighty difficult task.

Q. Now, your labor at Myrtle Grove—does it consist of white people and colored people, as it does in Biloxi?

A. Primarily colored.

Q. Primarily colored in Myrtle Grove. And about—would you say the ages of the people would vary from around sixteen to sixty, or something like that?

A. Yes.

Q. Do you have older people than sixty years of age working there?

A. Yes—some older than sixty—yes.

Q. About how old would be the oldest one you have [136] working there?

A. We've got them sixty-five. You can't tell how old some of them are.

Q. Do you know, Mr. Mavar, of any fact or circumstance of your operation at Myrtle Grove, as it has been carried on in the last year—that would materially differentiate from your operations at Biloxi—at the Mavar Shrimp and Oyster Company?

A. No.

Q. State whether or not—for the years that you've known the shrimp and oyster business—from the people from whom you learned it—and from the people who generally dealt in it—that in all respects it has been immemorially considered that the canning of oysters and shrimp was a separate and distinct process from the cleaning and opening of oysters and shrimp?

A. Yes, sir.

Q. Now, by canning, I mean—and you referred to—hermetically sealing and canning?

A. That's right.

Q. And after that is done—processing by cooking?

A. That's right.

Q. So as to keep the product. That's all.

[137] Cross-examination by Mr. CAMPBELL:

Q. Mr. Mavar, you mentioned a concern within the past that did shucking and shelling one place, and canning in another—what was the name of that concern?

A. The Dunbar-Dukate Company.

Q. Are they still in business?

A. No, sir.

Q. How long since they have been in business?

A. Oh, I guess, about seven or eight years.

Q. You said you knew of other instances where that was done?

A. We, ourselves, the Mavar Shrimp and Oyster Company have bought meat from the East Coast and canned it right here in Biloxi.

Q. Are you doing that now?
A. No, sir.
Q. How long since you've done that?
A. We did that—about—say 1946–47.
Q. Anybody else you know that's doing that?
A. The Williams Packing and Navigating Company has done it.
Q. Is that another one of your concerns?
A. No, sir.
[138] Q. You are not connected with it?
A. No, sir.
Q. How long since they've done it?
A. About the same time we were doing it.
Q. It is customary now to do that among the canning plants on this Gulf?
A. No; I wouldn't say it is customary.
Q. The general rule is that they will shuck and shell in one part of the building and move into the canning room to can?
A. That's right.
Q. So that each concern will do all of its own handling of the shrimp and oysters?
A. That's right.
Q. Now, the oysters aren't cooked in these retort kettles, are they?
A. Yes, sir.
Q. That is actually cooking—or merely a device to kill the oyster and make the shells easier to open?
A. No; they are cooked—they are cooked and it is a device to open the shell, and make them easy to open—all in one operation.
Q. What temperature do you use in those kettles?
A. We cook with pressure more than temperature—about a twelve- to fifteen-pound pressure.
[139] Q. And you don't know what the temperature is?
A. I think the temperature would be about 220 to 240.
Q. That is Fahrenheit?
A. That's right.
Q. And how long do you cook?
A. Depending on the type of oyster—from five to ten minutes.
Q. Out of the employees at Myrtle Grove—how many would normally make less than seventy-five cents an hour in shucking shrimp and oysters?
A. I'd purely have to guess at that—I'd guess at—say twenty or twenty-five percent.

Q. Those are the ones—you mean by that—those are the ones who consistently make less——

A. That's right.

Q. Than seventy-five cents?

A. Yes, sir.

Q. Do you know what proportion of your overall cost of operation is involved in the heading of shrimp or shucking oysters—labor cost?

A. You mean in figures?

Q. Yes.

A. No, I wouldn't——

Q. Can you give us any percentage?

[140] A. In other words—state the question again?

Q. Let's go at it from a different direction—let's assume that your canned shrimp has to be sold for a dollar to give you a reasonable profit—and all costs. What percentage of that cost is in the purchase price of the shrimp under normal circumstances?

A. The raw material—the purchase price of the shrimp?

Q. Yes.

A. I imagine sixty percent.

Q. And what percentage of that normal cost is charged against the employees who shuck these shrimp?

A. Oh, I couldn't answer that correctly—because there are so many other parts other than labor—in the shrimp in that dollar item.

By Mr. GUICE. May I say this, Mr. Campbell, if you will allow us, we will try to give you a statement showing a barrel of shrimp—the cost of each item that enters into it.

By Mr. CAMPBELL. I would appreciate it, Mr. Guice.

By Mr. GUICE. And when we do give it to you, why even though it might not be physically attached, it will be made a part of this deposition.

By the WITNESS. We can break it down.

[141] By Mr. CAMPBELL (continuing):

Q. Now, at the Mavar Shrimp and Oyster Company, do you sell canned shrimp and fresh shrimp?

A. Yes, sir.

Q. And canned and fresh oysters?

A. Canned oysters.

Q. Canned oysters, only?

A. That's right.

Q. What proportion of the shrimp handled by Mavar is normally sold as fresh shrimp—as uncanned shrimp—I mean?

A. That will vary depending on market conditions. We've had some years where eighty percent—when it was sold other

than canned, and other years—eighty to ninety percent were sold canned.

Q. I believe you said you were familiar with the operations at Myrtle Grove, also?

A. Yes, sir.

Q. Are you familiar with the answers to the interrogatories in the Myrtle Grove case?

A. I have reviewed them, but——

Q. Well, is that approximately ninety-seven and seventy-three hundred percent of the shrimp and oysters were sold canned?

A. I guess it's about that—it could be.

Q. It shows that only four quarters out of the seven [142] covered by the interrogatories, were any fresh shrimp and oysters sold. Do you know what percentage of those sales of fresh shrimp or oysters were allocated to shrimp and which to oysters?

A. No; it is so small, that I haven't——

Q. Now, all the operations at Myrtle Grove, from the shucking the oysters and heading the shrimp, are under the supervision of the Pure Food and Health Administration?

A. Yes, sir.

Q. They check all the way through?

A. That's right.

Q. When the processing starts, about how long—on the shucking of oysters—how long does it take for it to go through the plant and come out in the cans?

A. A couple of hours.

Q. That takes it all the way through?

A. All the way through.

Q. Do you make a practice of holding shrimp or oysters after they have been headed or shucked, before they are canned?

A. No; I wouldn't say we make a practice to hold—what do you mean holding?

Q. Well—twenty-four or forty-eight hours?

A. Oh, no—we don't do that.

Q. You might hold them long enough to get enough to [143] run your canning equipment.

A. That's right. That's right.

Q. How long would that ordinarily be?

A. Well, not long—thirty or forty minutes.

Q. Those shrimp and oysters are not in a nonperishable state before they go into the cans—they have to be handled right straight through—potentially?

A. Yes; potentially—they have to be handled right straight through, unless they are refrigerated.

Q. Have you read Mr. De Felice's deposition?

A. Yes.

Q. Is that an accurate statement of the processing carried on at Myrtle Grove?

A. Pretty much so.

Q. Is that the same type of processing carried on at Mavar?

A. Yes, sir—generally speaking—there may be some specific items that might vary a little bit—but generally speaking, it's the same.

Q. For example, you use the retort kettles at Myrtle Grove, and drums at——

A. Steam boxes.

Q. Steam boxes at Mavar. I believe that's all.

* * * * *

[144] CERTIFICATE

I, Dorothy S. Morris, a Court Reporter, in the State of Mississippi, and Harrison County, do hereby certify that the foregoing 30 pages contain a true and correct transcript of the testimony of the witness; Mr. Nick Mavar, as given by him in deposition form, in that certain cause, styled *Maurice G. Tobin, Secretary of Labor, United States Department of Labor, Plaintiff* v. *Myrtle Grove Packing Company, a corporation, Defendant,* Civil Action No. 3392.

Witness my signature, this the 10th day of December 1952.

(S) DOROTHY S. MORRIS,
Reporter.

[145] *Findings of fact and conclusions of law*

Filed January 13, 1954

[Number and title omitted.]

Stuart Rothman, Solicitor, Earl Street, Regional Attorney, Harry Campbell, Jr., Assistant Regional Attorney, United States Department of Labor, Attorneys for Plaintiff. W. L. Guice, Chalin Perez, Attorneys for Defendant.

WRIGHT, *District Judge:*

This proceeding was instituted by the Secretary of Labor to require compliance by the defendant with the requirements of the Fair Labor Standards Act of 1938,[1] as amended, in its em-

[1] 29 U. S. C. § 201 et seq.

ployment of individuals in the shucking of oysters and the heading and picking of shrimp. The question presented is whether the individuals concerned are engaged in the canning of shrimp and oysters within the contemplation of the Act. The issues of fact and law having come on to be heard on the pleadings and proofs of the parties and due deliberation having been had, the court now makes the following findings of fact and conclusions of law.

Findings of Fact

1. The court adopts the stipulation of the parties filed in this cause as findings of fact and makes the further and additional findings based upon the oral testimony adduced at the trial.

2. Oysters canned by the defendant are purchased from fishermen and delivered to the defendant at its dock. Normally, a sufficient quantity is received immediately to [146] begin their handling but if not, oysters may be held one or two days before any processing is begun so that a sufficient quantity for economical handling may be amassed.

3. The first step in the handling of oysters is the placing of them in retorts where they are steamed at temperatures of from 220 to 240 degrees Fahrenheit for periods varying from five to ten minutes, the temperature and time depending upon the size, etc., of the particular batch of oysters. Such steaming constitutes a partial cooking thereof, and is used only when the oysters are to be canned.

4. Following such steaming, the oysters are then dumped into tubs, partially opened and cooked and are removed from the shuck by the employees here involved. As the meat is removed from the shell, it is placed in 25-pound cans by the oyster shellers, weighed to determine the piece-rate earnings due such shuckers and then dumped into a tub for washing.

5. After being washed the oysters are "floated" in a water-filled flume into another room where they are inspected. After inspection they are placed in a tank with a brine solution and then are reinspected.

6. Following the last inspection, the oysters are then placed on trays and carried to what is described by defendant as the "packing room", where they are placed in cans. The cans are sealed by machinery and are then subjected to further heat treatment at about 120 degrees Centigrade for approximately 13 minutes.

7. Normally, the entire handling of oysters as above set forth, from the beginning of the steaming process to the completion of the final sterilization of the hermetically sealed cans requires only about two hours.

8. After the steaming process is begun oysters are not held at any point for a longer period than required to amass a sufficient quantity to justify the placing of an additional crew to work at the next step in their handling. It is the defendant's desire and it attempts to make the handling of the oysters in the manner above set forth a continuous process.

[147] 9. As with oysters, shrimp are delivered to the defendant's dock by fishermen. Also, as with oysters, if a sufficient quantity is not delivered the shrimp may be held a few days under refrigeration pending the receipt of a sufficient quantity to permit economical handling.

10. When the defendant is ready to begin the handling of the shrimp they are first dumped, raw, on a table where the employees here involved remove the edible portions of the shrimp.

11. After the shrimp are peeled they are floated in flumes, and simultaneously washed, to an inspection belt. After inspection they are placed in 10-pound containers and placed in a blanching tank and cooked for approximately three minutes. They are then reinspected and graded for size.

12. The inedible portions of the shrimp are placed in large containers by the employees removing them and such containers are weighed to determine the piece-rate earnings of such employees.

13. After being graded, as set out above, the shrimp are placed in trays and carried to what is designated by the defendant as its "packing room." The shrimp are then placed in cans by hand, weighed, and the cans are sealed by machinery and then subjected to a further treatment by heat for approximately 13 minutes at about 120 degrees Centigrade.

14. Normally, the total elapsed time from the time the shrimp are dumped on the table to be peeled to the completion of the final sterilization of the cans, is about one to two hours.

15. As with the oysters, after the handling of the shrimp is once begun they are not ordinarily held except at the completion of a given step they may be held for a short period while a sufficient quantity is being amassed to justify the calling in of a crew of workers to begin the next step in their handling. It is the desire of the defendant and every effort is expended to make the process a continuous one.

[148] CONCLUSIONS OF LAW

1. The court has jurisdiction of this action.

2. Independent consideration of this case by this court is precluded by the decision of the United States Court of Appeals for the Fifth Circuit in *Donnely* v. *Mavar Shrimp &*

Oyster Co., 190 F. 2d 409. The facts of this case are substantially indistinguishable from the facts in the *Mavar* case. It is true that the stipulation in the *Mavar* case, apparently a so-called friendly suit, goes further in favor of the defendant than the stipulation in the case at bar.[2] Where it does, however, it relates to questions of law which would not, of course, be controlling on the court. Consequently, in resolving the issue of coverage here, the difference in the stipulations may be disregarded.

Judgment for defendant.

J. SKELLY WRIGHT,
United States District Judge.

NEW ORLEANS, LOUISIANA, *January 13th, 1954.*

[149] *Judgment entered January 14, 1954*

[Number and title omitted.]

This cause came on to be heard at a former day, before the Court, on the pleadings, evidence and testimony offered on behalf of the respective parties and was taken under submission by the Court;

Now, on the consideration thereof and for the written reasons of the Court on file herein;

It is ordered, adjudged, and decreed by the Court that there be judgment in favor of the defendant, Myrtle Grove Packing Company, and against the plaintiff, Maurice J. Tobin, Secretary of Labor, dismissing plaintiff's suit.

(S) J. S. W.

[150] *Notice of appeal, filed March 10, 1954*

[Number and title omitted.]

Notice is hereby given that James P. Mitchell, Secretary of Labor, United States Department of Labor, plaintiff herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the court's final judgment and decree filed and entered in this action on February 24, 1954, in favor of the defendant, Myrtle Grove Packing Company, and

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[2] The stipulation in Mavar provides that none of the employees involved was "engaged in the canning of seafoods or aquatic products," and that the functions which they performed (picking shrimp and shucking oysters) "are separate, distinct, and have no immediate relationship" to the canning of those products. See *Donnely* v. *Mavar Shrimp & Oyster Co.*, *supra*, at page 413.

against the plaintiff, Secretary of Labor, dismissing plaintiff's suit.

(S) Stuart Rothman,
STUART ROTHMAN,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, Jr.,
Assistant Regional Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, United States Department of Labor, Rm. 203, 1114 Commerce Street, Dallas, Texas, or Office of the Solicitor, United States Department or Labor, Washington, D. C.

[151] *Designation of contents of record on appeal*

Filed March 10, 1954

[Number and title omitted.]

To the Clerk of the above-named Court:

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure the plaintiff-appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed on March 10, 1954, the complete record and all of the proceedings and evidence in this case.

(S) Stuart Rothman,
STUART ROTHMAN,
Solicitor,

(S) Earl Street,
EARL STREET,
Regional Attorney,

(S) Harry Campbell, Jr.,
HARRY CAMPBELL, Jr.,
Assistant Regional Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, Rm. 203, 1114 Commerce Street, Dallas, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington, D. C.

CERTIFICATE

Earl Street, one of the attorneys of record for James P. Mitchell, Secretary of Labor, United States Department of Labor, does hereby certify that he has served a true and correct copy of the foregoing Designation of Contents of Record on Appeal on Mr. W. L. Guice, of the firm of Rushing & Guice, attorney of record for defendant, by depositing same in the United States mail in a franked envelope addressed to him at his address of record in this case, on the 9th of March, 1954.

(S) Earl Street.
EARL STREET.

[152] *Clerk's certificate*

I, A. Dallam O'Brien, Jr., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify that the foregoing 151 pages contain and form a full, true and complete transcript of the record in the cause entitled "*Maurice J. Tobin, Secretary of Labor, United States Department of Labor, Plaintiff* v. *Myrtle Grove Packing Company, a corporation, Defendant,*" No. 3392 of the Civil Action Docket of this Court, as made up in accordance with the Designation of Contents copied therein.

Witness my hand and the seal of the said Court at the City of New Orleans, Louisiana, this 28th day of April A. D. 1954.

A. DALLAM O'BRIEN, Jr.,
Clerk.

By A. F. PAGE, Jr.,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1954

88 *Minute entry of argument and submission*

[Omitted in printing]

January 6, 1955

89 In the United States Court of Appeals for the Fifth Circuit

No. 15051

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

MYRTLE GROVE PACKING COMPANY, APPELLEE

Opinion of the Court

Filed January 12, 1955

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(January 12, 1955)

Before HUTCHESON, Chief Judge, BORAH, Circuit Judge, and DAWKINS, District Judge

PER CURIAM:

AFFIRMED. Donnelly v. Mavar Shrimp & Oyster Co., 190 F. (2) 409.

90 In United States Court of Appeals for the Fifth Circuit

January 12, 1955

No. 15051

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

MYRTLE GROVE PACKING COMPANY

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

printing.]

91 [Clerk's cerificate to foregoing transcript omitted in

92 In United States Court of Appeals for the Fifth Circuit

No. 13419

DONNELY ET AL.

v.

MAVAR SHRIMP & OYSTER CO., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Before HOLMES, BORAH and RIVES, Circuit Judges.
HOLMES, Circuit Judge.

Opinion

July 17, 1951

This action is brought under the Declaratory Judgments Act, as amended, which is contained in Chapter 151 of the Federal Judicial Code of 1948, as amended by the Act of May 24, 1949. See Title 28 of U. S. Code, Sections 2201 and 2202. Federal jurisdiction is based solely on diversity of citizenship, and the amount involved exceeds $3,000 exclusive of interest and costs. This appeal is from a judgment declaring the rights and legal relations of the parties under Section 213 (a) (5) of Title 29 United States Code.

The Declaratory Judgments Act is a procedural statute that provides an additional remedy for use in cases of which the federal courts already have jurisdiction; it should be given a liberal construction. The procedure is expressly recognized

93 in Fed. Rules Civil. Proc. rule 57, 28 U. S. C. A., which says that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate; also that the court may order a speedy hearing of an action for declaratory judgment, and may advance it on the calendar. See Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 5 Cir., 137 F. 2d 176, affirmed in 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949; Gully v. Interstate Natural Gas Co., 5 Cir., 82 F. 2d 145; Mississippi Power & Light Co. v. City of

Jackson, 5 Cir., 116 F. 2d 924; Borchard, Declaratory Judgments, pp. 619–621.

We have no doubt that this case involves an actual justiciable controversy, which in the interest of justice should be speedily heard and determined in accordance with the letter and spirit of the just cited rule. Delay in adjudicating this controversy might be financially disastrous to many small operators in the shrimp and oyster industry. Said Section 213 (a) (5), as amended, exempts from the minimum wages and maximum hours provisions of the Act any employee engaged in the catching or cultivating of any kind of fish, shellfish, or other aquatic forms of animal and vegetable life, including packing of such products for shipment, "processing (other than canning)," marketing, freezing, curing, storing or distributing, the above products, or byproducts thereof. The word processing, as used in the exempting clause, includes a series of acts, events, and occurrences, which are necessary to transform raw seafood into an edible commercial product.

The statute excludes from the minimum wages and max-
94 imum hours provisions of the Act every one of the acts and progressive steps, except canning, included in the term processing.

Canning includes hermetically sealing, and sterilizing or pasteurizing, and every other operation necessarily performed on the products before they are placed in cans, bottles, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers; also included are subsequent operations such as the labeling of the cans or other containers, and the placing of the sealed containers in cases or boxes, whether such subsequent operations are performed as a part of an uninterrupted or interrupted process. Every other act or step in catching, curing, marketing, and distributing aquatic products is embraced in the exemption clause except only those especially performed upon the products for the purpose of canning. All the preparatory things are excluded from the act that can be and are done when canning is not intended or contemplated; and all the subsequent operations are excluded, as a matter of course, when canning has not actually taken place. Catching, freezing, curing, shelling, or shucking, shrimp or oysters, constitutes no part of the canning process. Corn is sometimes shucked in the field, and pecans are often shelled without canning. Wringing its neck and plucking its feathers are primary but separable processes in cooking a chicken. The primary processes in the silk industry are performed in Asia, and the partially processed silk product is by law imported, duty
95 free, into the United States. Ginning is the primary process in the cotton textile industry, but a cotton gin is dis-

tinguishable from a textile mill. A corn shucker is not a miller, and a shrimp picker is not engaged in canning shrimp any more than a corn shucker is engaged in canning corn. The least that can be said is that the processes are separable; and that the Act so contemplated is indicated by retaining the exemption as to processes other than canning.

If picking Shrimp and shucking oysters are not exempted, what are the processes other than canning that were in the legislative mind? Catching, cultivating, curing, storing, freezing, and marketing, are without qualification specifically exempted from the wages and hours law. What, then, we repeat, are the processes (other than canning) that the amendment intended to exclude from the exemptions if the actual canning retroactively embraced everything previously done to the product except catching, curing, storing, freezing, and marketing? The position and punctuation of clause (5) in paragraph (a) of Sec. 213, Title 29, indicate that the parenthetical words (other than canning) modify only the preceding word "processing" and not the words "marketing, freezing, curing, storing, or distributing." Curing means to prepare for preservation or permanent keeping; to preserve as to cure beef or fish. See Webster's Dictionary. We must give full effect to all the words used by the Congress; to do this means that preparing shrimp or oysters for preservation or permanent keeping is exempted from the provisions of both Sections 206 and 207 of Title 29. These appellants are not engaged in canning; they do not work in the canning room; their work is frequently done without any intention on the part of their employer to can the articles that are being processed; they are engaged in a process involving shrimp and oysters that is distinct from, not necessarily related to, and often not succeeded by, canning. Cochrane v. Deener, 94 U. S. 780, 788, 24 L. Ed. 139; Waldman v. Swanfeldt, 9 Cir. 66 F. 2d 294, 295; Henry v. Markesan State Bank, 8 Cir., 68 F. 2d 554, 557; Waller v. Humphreys, et ux., 5 Cir., 133 F. 2d 193; McComb v. Consolidated Fisheries Company, 3 Cir., 174 F. 2d 74; Cincinnati Soap Company v. United States, D. C., 22 F. Supp. 141, 143; State v. Pacific American Fisheries, 73 Wash. 37, 131 P. 452–454.

96

The statute recognizes that, in obtaining and offering shrimp and oysters for sale for use as food, it is necessary to cultivate them, catch, cure, freeze, pack, can, or otherwise transform, them into a marketable product. Prior to 1949, Section 213 (a) (5) exempted every act of an employee in catching, curing, canning, cultivating, and marketing, any kind of shellfish or other aquatic forms of animal and vegetable life. In 1949, Section 213 (a) (5) was amended so as to exclude canning from the exemption, but it left the exemption intact as to every other distinct act and

feature of the industry that was necessary to convert the raw material of aquatic life into a marketable product. As used in the statute, processing is an inclusive word that embraces all the acts necessary to improve the material and convert it into an edible product. The amendment of 1949 did not strike the word
97 processing out of the exempting clause (as it might have done), but limited its scope and effectiveness only to acts and doings other than canning. The act of canning is only one of several processes necessary in turning the aquatic material into food fit for human consumption. We must ascribe to the legislative mind some reason for leaving the word processing (other than canning) in the exemption clause of said Section 213 (a) (5). What are processes other than canning are questions of fact to be decided upon the special characteristics of the process or operation of the particular business or industry.

The findings of fact by the district court are not clearly erroneous; and the judgment appealed from is affirmed.

Affirmed.

RIVES, Circuit Judge (dissenting).

In arriving at what is included in "canning," I do not think that the word "processing" in the exempting clause of the 1949 amendment is significant, because at the same time Section 213 (b) (4) was added providing an exemption from the overtime requirements only for "the canning of any kind of fish, shellfish, * * *," and there the word "processing" was not employed. It seems apparent that the overtime exemption was intended as a substitute for the complete exemption previously provided in Section 213 (a) (5) for "any employee employed in * * * canning."

Canning is just one form of processing and to exclude everything included in the broader term would leave to canning a very limited meaning. I think that canning includes the
98 necessary preparation of the product performed as an integral part of a continuous uninterrupted process even though the same preparation might be necessary to make the product edible without canning. That the product must be shucked, cleaned, peeled, and cooked before it is eaten at all does not remove those operations from canning when they are performed in connection with canning and as a part of that process. Exemptions from this Act must be "narrowly construed" and extended only to "those plainly and unmistakably within its terms and spirit." A. H. Phillips Co. v. Walling, 324 U. S. 490, 493, 65 S. Ct. 807, 808, 89 L. Ed. 1095.

Nevertheless, upon the record before us, I would concur in the result if I could bring myself to believe that the case presents an actual controversy. To my way of thinking, it is plainly a

"friendly" suit "in which there is no actual antagonistic assertion of rights." C. I. O. v. McAdory, 325 U. S. 472, 475, 65 S. Ct. 1395, 1397, 89 L. Ed. 1741. A careful study of the record leads me inescapably to the belief that both sides desired the same result to the proceeding and gave the Court not the slightest chance of arriving at a contrary conclusion.

The plaintiffs are two companies engaged in the commercial canning of shrimp and oysters as well as in their taking and harvesting, cleaning and processing. The defendants are eighteen "casual workers" of the plaintiffs selected by the plaintiffs themselves out of a total of about 400 laborers. We must know in reason that the defendant casual workers had no considerable funds with which to employ counsel. Upon oral arguments
99 when plaintiffs' counsel praised the generosity of defendants' counsel in representing his clients without charge, defendants' counsel shook his head, but it is hard to say whether that was in denial of the praise or in disapproval of the propriety of the observation in open Court.

The complaint alleged in paragraph 3 that "none of the defendants above named, at any time during the period hereinabove recited was engaged in the canning of sea foods or aquatic products." The defendants admitted the allegations of paragraph 3 of the complaint. Thereby they literally admitted themselves out of Court. Further the defendants in their answer admitted that the functions which they performed (picking of shrimp and shucking of oysters) "are separate, distinct, and have no immediate relationship" to the canning, and further "that the canning * * * is separate, distinct, unrelated to and apart from the original process in which the shrimp or oysters are received at the wharf, going through a distinct and intricate process by which they become merchantable food prior to any of the actual processes needed or required in canning." The only allegations of the complaint which the defendants denied were the conclusions of the pleading with reference to the meaning of the law.

If we would assume that the admissions in the defendants' answer were made unintentionally or by oversight we have but to examine the vidence. A single witness testified for the plaintiffs, the superintendent of one of their plants. He first testified favorably to the defendants as follows:

100 "Q. Now, before the Court today, Mr. Mavar, is whether or not the shucking of oysters, that is, the operation beginning at the pier and ending at the pay-off window, if that is a necessary part of the canning of oysters. Do you know anything about that—I mean, are you acquainted with that?—A. Yes, sir; that is a part of the canning."

The defendants made no point of this admission, but permitted plaintiffs' counsel by leading questions to get the witness to conform his testimony to the plaintiffs' case.

The plaintiffs had "other witnesses who would testify to substantially the same thing as this witness," and naturally the Court saw no necessity of examining the other witnesses. So the plaintiffs rested.

The defendants called two witnesses, both women, one the President and the other the Secretary and Treasurer of the Seafood Workers Association, a union that was supposed to represent the defendants.

The President expressed her complete accord with, and volunteered to make a moving speech for, the plaintiffs in the following answers:

"Q. If you paid them all the same 75¢ an hour, many of them would only pick about 10 pounds an hour?—A. Right.

"Q. Then you would be paid 75¢ an hour for only 40¢ an hour?—A. That's right. And, may I say this, that our workers don't want that. They want to earn what they can earn. We have a good many old workers in our plant, who have grown old in service. They can go in these plants, and they are per-
101 mitted to go and come as they please. They can work three or four hours and go on home, and they thank God every night of their life that they were permitted to earn that day. They are satisfied and don't expect to make as much as the fast workers. Everybody is satisfied with what they can earn."

The Secretary-Treasurer was scarcely less zealous than the President in her accord with the plaintiffs:

"Q. I want to ask if there is anything that you know about this lawsuit with reference to the wages of employees, piece working employees, you care to state in any manner, of the desires in this case; have you got any information you care to give the Judge?—A. We would like to work like we did in the past, which has been the method of our grandmothers and grandfathers. In piece work you earn what you can, a scale of work set by the association and then brought to a meeting with the packers. We would like to work like we did in the past."

The sensible precaution was observed by defendants' counsel of examining several of the defendants themselves, but simply as to their conclusions of whether the President and the Secretary-Treasurer of their organization had testified truthfully, accurately and correctly. In each instance the defendant witness answered yes, and that if asked all the questions the answers would be the same. That was all of the testimony for the defendants.

Small wonder that the Court found it necessary to inquire from defendants' counsel:

"By the COURT:

102 "Let me ask you, Mr. Adam. As I understand it these defendants are really demanding the minimum wage if they are covered by it?

"By Mr. Adam, Counsel for Defendants:

"Yes. We claim they come in under the wage and hour law."

On appeal, this Court's responsibility is the more grave in that if the majority is in error, that error will probably not be corrected because the amicus curiae can go no further and the parties seem to be of a single mind.

If this judgment merely concluded the eighteen named defendants it would be bad enough, but when we consider that it concludes also "all persons working for the plaintiffs who are similarly situated with the defendants," and that the plaintiffs employ about 400 laborers and further that it sets a pattern for the future and affects persons to be employed in the days to come, and when we still further consider the use of this case as a precedent either by the Administrator or by the Courts, then, if the Court decides this case without the safeguard of adequate presentation of all questions of law and fact by actual antagonistic parties, it is clear that the Court itself might become the instrument of working an injustice. The effect of the decision in this case that shuckers of oysters and cleaners of shrimp are exempt wholly instead of partially from the Wage and Hour Law is relatively unimportant compared to the danger of the precedent set when we take jurisdiction of a case that involves no actual controversy.

In declaratory judgment actions such as this there are
103 involved the interests not only of the employers who are parties and their employees, but also of competing employers and their employees, and still further those of the public. Tennessee Coal Iron & R. Co. v. Muscoda Local, D. C., 40 F. Supp. 4, affirmed 5 Cir., 135 F. 2d 320, rehearing denied, 5 Cir., 137 F. 2d 176, affirmed 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949, is taken as a precedent for this action. That case was hotly contested; counterclaims on behalf of the employees were filed and were successfully prosecuted. There was no counterclaim in the case now before the Court. In the Muscoda case the administrator intervened in the District Court and hence the interests of the public and of competitors were represented. Appearance of the Administrator as amicus curiae in the appellate court, though helpful, is not sufficient, for the record on which the case must be decided is concluded in the District Court.

If the decision in the instant case stood without dissent, I anticipate that a number of similar suits would be filed, and that in most of them the friendly nature of the suit would not be so self evi-

dent as in this case. It seems to me that in the exercise of the discretion vested in a district court, it should refuse to proceed with such a declaratory judgment action in the absence of the Administrator to represent the interests of competing employers and employees and of the public.

I think that the judgment should be reversed with directions to the district court to dismiss the cause unless the Administrator becomes a party, and therefore I respectfully dissent.

104 Supreme Court of the United States

No. 704, October Term, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MYRTLE GROVE PACKING COMPANY

Order allowing certiorari

Filed May 23, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1955

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
Reasons for granting the writ	7
Conclusion	14
Appendix A	17
Appendix B	35

CITATIONS

Cases:

Addison v. *Holly Hill Co.*, 322 U. S. 607 — 13

Donnely v. *Mavar Shrimp & Oyster Co.*, 190 F. 2d 409 — 6, 8, 9, 12

Phillips Co. v. *Walling*, 324 U. S. 490 — 13

Powell v. *United States Cartridge Co.*, 339 U. S. 497 — 13

Tobin v. *Blue Channel Corp.*, 198 F. 2d 245 — 7, 8, 9, 12, 13

Statute:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*):

- Section 6 (a) — 35
- Section 11 (c) — 35
- Section 13 (a) (5) — 5, 6, 9, 10, 13, 35, 36
- Section 13 (b) (4) — 5, 8, 9, 10, 13, 36

Miscellaneous:

Fishery Statistics of the United States, 1951, Fish and Wildlife Service, United States Department of the Interior, Washington, D. C., p. 289 — 12

95 Cong. Rec. 14874, 14878 — 11

95 Cong. Rec. 14932 — 10, 11

Shrimp and Oyster Canning in the Gulf Area, Wage and Hour and Public Contracts Divisions of the United States Department of Labor, February 1951, unpublished — 14

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ———

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MYRTLE GROVE PACKING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on January 12, 1955.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 82–85; App. A, *infra*, 17–21) are reported at 117 F. Supp. 599. The *per curiam* opinion of the Court of Appeals (App. A, 22) is reported at 217 F. 2d 952.

JURISDICTION

The judgment of the Court of Appeals (App. A, 22) was entered on January 12, 1955. The juris-

diction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in Appendix B, *infra,* pp. 35–36.

QUESTION PRESENTED

Whether employees who remove the shell from seafoods as an integrated step in the continuous and uninterrupted process of canning these products are employed in "canning," which Section 13 (b) (4) of the Fair Labor Standards Act exempts from the overtime but not the minimum wage provisions, or are employed in "processing (other than canning)", which Section 13 (a) (5) exempts from both the minimum wage and overtime provisions of the Act.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the minimum wage and record-keeping provisions of the Act. The respondent is almost exclusively engaged in the business of canning shrimp and oysters for interstate commerce. The employees concerned peel the shrimp and shuck the oysters as an integrated step in the continuous canning process.

The parties stipulated and the district court found that sales of canned shrimp and oysters amounted to $930,356.34 and constituted 97.67% of respondent's total sales (R. 28, 83; Fdg. 1) during a period from January 1, 1951, to September 30, 1952, which the court found was "typical" of "respondent's operations and practices" (R. 27, 83; Fdg. 1), and that "Substantially all of the shrimp and oysters handled (approximately 95%)" are being produced for interstate commerce (R. 26, 83; Fdg. 1).[1]

The integration of the peeling and shucking operations with the canning process is evident from the trial court's findings. The court found that "the total elapsed time from the time the shrimp are dumped on the table to be peeled to the completion of the final sterilization of the cans, is about one to two hours" (R. 84; Fdg. 14); and that "the entire handling of oysters" from "the beginning of the steaming process to the completion of the final sterilization of the hermetically sealed cans requires only about two hours" (R. 83; Fdg. 7). Once the canning of the shrimp or oysters is begun they are not held at any step except to accumulate a sufficient

[1] In only one of the seven quarterly periods included in the stipulation did the respondent sell any shrimp or oysters processed by a method other than canning, and such sales amounted to $7,569.05, or only 0.8 of 1%, of the respondent's total sales. The balance of respondent's sales, 1.53% of the total, consisted of shrimp and oysters sold in the shell with no processing whatever. (R. 28.)

quantity to begin the next step (R. 84; Fdgs. 8, 15).

The first step in the canning of oysters is to cook them partially by steaming in retorts for five to ten minutes (R. 83; Fdg. 3). "Following such steaming, the oysters are then dumped into tubs, partially opened and cooked and are removed from the shuck by the employees here involved" (R. 83; Fdg. 4). After a shucker weighs the oysters he has shucked to determine his piece rate earnings, they are dumped into a tub for washing (R. 83; Fdg. 4) and then floated into another room where they are inspected, placed in a brine tank, and reinspected (R. 83; Fdg. 5). The oysters are then carried to the "packing room" where they are placed in cans, sealed, and subjected to further heat treatment (R. 83; Fdg. 6). The court found that it was the "defendant's [respondent's] desire and it attempts to make the handling of the oysters in the manner above set forth a continuous process" (R. 84; Fdg. 8).

Shrimp are canned in accordance with a very similar procedure. They "are first dumped, raw, on a table where the employees here involved remove the edible portions" (R. 84; Fdg. 10).[2] They are then floated in flumes to an inspection belt, inspected, and cooked in a blanching tank (R. 84; Fdg. 11). After reinspection and grad-

[2] The piece rate earnings of these employees are determined by weighing the inedible portions which they have removed (R. 84; Fdg. 12).

ing for size, they are carried to the packing room where they are placed in cans, sealed and heat treated (R. 84; Fdg. 13). The court found that "It is the desire of the [respondent] and every effort is expended to make the process a continuous one" (R. 84; Fdg. 15).

The testimony of the respondent's vice president emphasized the complete integration between the preparatory work performed by the employees herein and the actual putting into cans. He testified that "for all practical purposes" respondent Myrtle Grove had "done nothing but can" the shrimp and oysters it handled (R. 47) since it was opened in 1946 or 1947 (R. 50) and had not to his knowledge canned "shrimp or oysters that were shelled or picked somewhere else" (R. 48).

Prior to the enactment of the Fair Labor Standards Amendments of 1949, Section 13 (a) (5) exempted from both the wage and hour requirements of the Act any employee employed in "processing, marketing, freezing, *canning,* curing, storing or distributing" any "aquatic forms of animal and vegetable life" (emphasis added).

The 1949 amendments deleted the word "canning" from this list of activities and qualified "processing" by the insertion of the parenthetical phrase "(other than canning)" so that it now reads "processing (other than canning)." At the same time, a new subsection numbered 13 (b) (4) was added, providing an exemption from the

overtime compensation provision, *but not from the minimum wage,* for the "canning of any kind of fish, shellfish," etc.

The district court held that the broader exemption of Section 13 (a) (5) applies and dismissed the complaint, on the sole ground that "Independent consideration of this case by this court is precluded by the decision of the United States Court of Appeals for the Fifth Circuit in *Donnely* v. *Mavar Shrimp & Oyster Co.,* 190 F. 2d 409." The court of appeals affirmed *per curiam* without opinion (App. A, 22), citing only its decision in the *Donnely* case (App. A, 23–34).

Donnely v. *Mavar Shrimp & Oyster Co.* was a declaratory judgment action instituted ostensibly by employees. The majority opinion of the Fifth Circuit there held that the picking of shrimp and shucking of oysters are processes "separable" from canning and are exempt from both the minimum wage and overtime requirements as "processing (other than canning)" under Section 13 (a) (5) (190 F. 2d at 411; App. A, *infra,* 25). As pointed out in the dissenting opinion, the Government was not a party to that action and there were indications that it was a "friendly suit" between parties who "desired the same result" (*id.* at 412–414; App. A, 29). The parties had in effect stipulated the very issue in controversy in the instant case by agreeing that none of the employees involved were "engaged in the canning of sea foods or aquatic

products," and that the picking of shrimp and shucking of oysters "are separate, distinct, and have no immediate relationship" to the canning (*id.* at 413; App. A, 30).

REASONS FOR GRANTING THE WRIT

The decision below conflicts squarely with the decision of the Court of Appeals for the Fourth Circuit in *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245. We believe that the clear legislative purpose of the exemptions involved as well as the settled principles established by this Court for construing all exemptions from the Fair Labor Standards Act demonstrate the error of the court below. In any event, the conflict between the Fourth and Fifth Circuits, affecting the applicability of the Act's minimum wage provisions to a large proportion of the employees in the fish canning industry, should be resolved by this Court.

1. Except for the fact that the employees in the instant case are engaged in peeling shrimp and shucking oysters while those in *Tobin* v. *Blue Channel Corp., supra,* pick the meat from the claws of crabs, the cases are virtually identical. If there is any factual distinction, the situation here makes it even clearer that shelling the seafood is an integral part of "canning." In this case, the district court found that the preparatory work was performed almost exclusively for canning (R. 28, 83; Fdg. 1); in the *Blue Channel* case the preliminary operations were also performed to

fill "substantial orders for fresh and frozen crabmeat" (198 F. 2d at 247).

The Fourth Circuit in *Blue Channel*, by unanimous decision, held that the claw pickers were engaged in "canning" within Section 13 (b) (4) and thus entitled to the minimum wage protection. The court reasoned that the employer's main objective is canning, which is accomplished by "a continuous series of operations," and that "extracting the crabmeat from the claw, is an early and preparatory, but nonetheless an essential and integrated, step in the continuous and uninterrupted process of canning crabmeat" (198 F. 2d at 248). It concluded that it could not "view the necessary preparatory operations of the claw pickers in picking and sorting the crabmeat in isolation from the canning process as a whole." *Ibid.*

The Fifth Circuit in the decision below, and in the *Donnely case* (by a divided court), reached exactly the opposite result, despite the express recognition in the majority opinion in *Donnely* that "canning" includes, in addition to hermetically sealing, "every other operation necessarily performed on the products before they are placed in cans, bottles, or other containers" (190 F. 2d at 411; App. A, 25).

The *Blue Channel* case was decided subsequent to the *Donnely* decision and expressly declined to follow the majority opinion in *Donnely*, although pointing out that the cases might pos-

sibly be distinguished on the ground of the apparently "friendly" nature of the action and the stipulation in *Donnely* (198 F. 2d at 247–248). The instant case was then instituted by the Secretary of Labor in a district court in the Fifth Circuit in an effort to bring about conformity of enforcement. But the Court of Appeals, rejecting the suggestion that *Donnely* might be distinguished because of the manner in which it was presented, held that decision decisive of the instant case. Since this case is not distinguishable from *Blue Channel*, a direct conflict is now presented.

2. The decision below is incorrect. It is contrary to the plain meaning and express legislative purpose of the exemptions; and it is also inconsistent with the well settled principles established by this Court's decisions for construing exemptions from this Act.

(a) The obvious design of the 1949 Amendments in changing Section 13 (a) (5) and adding Section 13 (b) (4) was to extend the minimum wage benefits of the Act, but not the overtime provisions, to workers in the fishery and seafood industry employed in "canning."

The 1949 amendment to Section 13 (a) (5) deleted the word "canning" from its list of exempt activities. To make it unmistakably clear that the complete exemption would no longer apply to canning, the generic word "processing" was expressly qualified by the insertion

of a parenthetical phrase which can have had no purpose other than to preclude its extension to anything properly included in the term "canning." The amended phrase now reads "processing (other than canning), marketing, freezing, curing, storing, or distributing." At the same time, the new section numbered 13 (b) (4) was added, exempting "canning" from the Act's overtime provisions but not from the minimum wage requirements.

The meaning and effect of these amendments, insofar as concerns the preparatory operations here involved, was clearly and specifically stated in the legislative reports. Both the form and substance of the Section 13 (a) (5) and Section 13 (b) (4) exemptions were the work of the Conference Committee which expressly explained that "canning" includes *"necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers."* 95 Cong. Rec. 14932–33. (Emphasis added.)

As originally adopted by the House of Representatives and the Senate, the amendments had differed in their treatment of fish canning. The Senate amendment made no change in the 1938 Act in this particular. The House bill provided a 14-workweek exemption for any industry engaged in the first processing or canning of fish in the raw or natural state. The bills adopted by each House were referred to a conference committee to reconcile the differences (95 Cong.

Rec. 14932). The compromise bill as agreed on by this committee was adopted and enacted into law. The unanimous report of the House conferees, explaining this bill to the House of Representatives before it was adopted by that body, said with respect to the activities embraced in the word "canning":

> * * * Under the conference agreement "canning" means hermetically sealing and sterilizing or pasteurizing and has reference to a process involving the performance of such operations. *It also means other operations performed in connection therewith such as necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers.* Also included are subsequent operations such as the labeling of the cans or other containers and the placing of the sealed containers in cases or boxes whether such subsequent operations are performed as a part of an uninterrupted or interrupted process. [95 Cong. Rec. 14932–33; emphasis added.]

The same description of "canning" appears in the Statement of the Majority of the Senate Conferees (95 Cong. Rec. 14874 at 14878).

The Fourth Circuit was thus plainly correct in ruling that shelling, peeling and picking operations are such "necessary preparatory operations" when, as here, "canning is the main ob-

jective * * * and * * * is accomplished by a continuous series of operations * * *" (*Blue Channel,* 198 F. 2d at 248). The court below itself expressly recognized the Congressional intent to include in the term "canning" "every operation necessarily performed on the products before they are placed in cans" (*Donnely* opinion, 190 F. 2d at 411, App. A, 25). Its exclusion, nonetheless, of picking and shucking operations seems to rest solely on its erroneous assumption that "processing (other than canning)" in Section 13 (a) (5) would be meaningless if not construed to embrace picking and shucking. But, as pointed out by the Fourth Circuit in *Blue Channel:* "Certainly, scores of situations could be mentioned in which products are processed but not canned" (198 F. 2d at 248).[3]

[3] The exemption for "processing (other than canning)" has substantial practical meaning and ample scope for operation apart from the preparatory operations preceding canning. The production of oil and meal from menhaden and other fish, and the filleting of fresh fish, are ready examples of very substantial practical importance. "Practically the entire 1951 menhaden production was used in the manufacture of oil and meal." *Fishery Statistics of the United States 1951,* Fish and Wildlife Service, United States Department of the Interior, Washington, D. C., p. 289. Neither the extracting and rendering of oil from the fish nor the filleting of fresh fish is included in the specifically mentioned operations—other than "processing"—exempt under Section 13 (a) (5). Furthermore, the terms of the exemption itself show that it applies to many products which are processed in ways not involving freezing, curing, storing or canning. Its terms embrace not only fish, but also "sponges, seaweeds, or other aquatic forms of animal and vegetable

(b) The decision below gives the broadest possible scope to the complete exemption of Section 13 (a) (5), and construes as narrowly as possible the language of Section 13 (b) (4), which was enacted to extend the coverage of the minimum wage provisions of the Act. As the Fourth Circuit said of the latter provision in *Blue Channel:* "We are here dealing with a remedial statute. Its terms of coverage should therefore, be liberally rather than narrowly construed." 198 F. 2d at 248. The Fifth Circuit's approach is diametrically opposed to this Court's repeated and consistent rulings that "[*a*]*ny* exemption from such humanitarian and remedial legislation must * * * be narrowly construed." (Emphasis added.) (*Phillips Co.* v. *Walling,* 324 U. S. 490, 493; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 617; *Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 517).

3. The above conflicts and inconsistencies are of substantial importance to a fair and uniform

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life." Thus, the general word "processing" may apply to such activities as the drying of seaweed preparatory to the manufacture of agar and to the drying and cleaning of sponges.

It is thus seen that the processes applied to the materials mentioned in Section 13 (a) (5) are many and varied. The reasonable construction, therefore, of the word "processing", as used there, would seem to include all of such processes, though not specifically named, except the process of canning, which has been specifically excluded. This interpretation gives the word "processing" the meaning which context and legislative history require, without distorting the ordinary realistic meaning of the term "canning."

enforcement of the Act, inasmuch as some 75 to 90% of the production workers in shrimp and oyster canning plants are employed in these necessary preparatory operations, according to a study made by the Department of Labor.[4] A large proportion of such plants are located in the Fifth Circuit. Thus, unless and until the issue is settled by this Court, numerous workers in canning plants in the Fifth Circuit will be denied the minimum wage benefits of the Act and shell fish canneries located in this Circuit will have a substantial competitive advantage over those located in the adjoining Fourth Circuit.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor, Department of Labor.

APRIL 1955.

[4] *Shrimp and Oyster Canning in the Gulf Area*, Wage and Hour and Public Contracts Divisions of the United States Department of Labor, Feb. 1951, unpublished.

APPENDICES

337691—55——3

APPENDIX A

United States District Court, E. D. Louisiana, New Orleans Division

Jan. 13, 1954

MITCHELL, SECRETARY OF LABOR

v.

MYRTLE GROVE PACKING COMPANY

Civ. A. No. 3392

WRIGHT, *District Judge:* This proceeding was instituted by the Secretary of Labor to require compliance by the defendant with the requirements of the Fair Labor Standards Act of 1938, as amended, in its employment of individuals in the shucking of oysters and the heading and picking of shrimp. The question presented is whether the individuals concerned are engaged in the canning of shrimp and oysters within the contemplation of the Act. The issues of fact and law having come on to be heard on the pleadings and proofs of the parties and due deliberation having been had, the court now makes the following findings of fact and conclusions of law.

Findings of Fact

1. The court adopts the stipulation of the parties filed in this cause as findings of fact and makes the further and additional findings based upon the oral testimony adduced at the trial.

2. Oysters canned by the defendant are purchased from fishermen and delivered to the defendant at its dock. Normally, a sufficient quantity is received immediately to begin their handling but if not, oysters may be held one or two days before any processing is begun so that a sufficient quantity for economical handling may be amassed.

3. The first step in the handling of oysters is the placing of them in retorts where they are steamed at temperatures of from 220 to 240 degrees Fahrenheit for periods varying from five to ten minutes, the temperature and time depending upon the size, etc., of the particular batch of oysters. Such steaming constitutes a partial cooking thereof, and is used only when the oysters are to be canned.

4. Following such steaming, the oysters are then dumped into tubs, partially opened and cooked and are removed from the shuck by the employees here involved. As the meat is removed from the shell, it is placed in 25 pound cans by the oyster shellers, weighed to determine the piece rate earnings due such shuckers and then dumped into a tub for washing.

5. After being washed the oysters are "floated" in a water-filled flume into another room where they are inspected. After inspection they are placed in a tank with a brine solution and then are reinspected.

6. Following the last inspection, the oysters are then placed on trays and carried to what is described by defendant as the "packing room", where they are placed in cans. The cans are sealed by machinery and are then subjected to

further heat treatment at about 120 degrees Centigrade for approximately 13 minutes.

7. Normally, the entire handling of oysters as above set forth, from the beginning of the steaming process to the completion of the final sterilization of the hermetically sealed cans requires only about two hours.

8. After the steaming process is begun oysters are not held at any point for a longer period than required to amass a sufficient quantity to justify the placing of an additional crew to work at the next step in their handling. It is the defendant's desire and it attempts to make the handling of the oysters in the manner above set forth a continuous process.

9. As with oysters, shrimp are delivered to the defendant's dock by fishermen. Also, as with oysters, if a sufficient quantity is not delivered the shrimp may be held a few days under refrigeration pending the receipt of a sufficient quantity to permit economical handling.

10. When the defendant is ready to begin the handling of the shrimp they are first dumped, raw, on a table where the employees here involved remove the edible portions of the shrimp.

11. After the shrimp are peeled they are floated in flumes, and simultaneously washed, to an inspection belt. After inspection they are placed in 10 pound containers and placed in a blanching tank and cooked for approximately three minutes. They are then reinspected and graded for size.

12. The inedible portions of the shrimp are placed in large containers by the employees removing them and such containers are weighed to

determine the piece rate earnings of such employees.

13. After being graded, as set out above, the shrimp are placed in trays and carried to what is designated by the defendant as its "packing room." The shrimp are then placed in cans by hand, weighed, and the cans are sealed by machinery and then subjected to a further treatment by heat for approximately 13 minutes at about 120 degrees Centigrade.

14. Normally, the total elapsed time from the time the shrimp are dumped on the table to be peeled to the completion of the final sterilization of the cans, is about one to two hours.

15. As with the oysters, after the handling of the shrimp is once begun they are not ordinarily held except at the completion of a given step they may be held for a short period while a sufficient quantity is being amassed to justify the calling in of a crew of workers to begin the next step in their handling. It is the desire of the defendant and every effort is expended to make the process a continuous one.

Conclusions of Law

1. The court has jurisdiction of this action.

2. Independent consideration of this case by this court is precluded by the decision of the United States Court of Appeals for the Fifth Circuit in *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F. 2d 409. The facts of this case are substantially indistinguishable from the facts in the *Mavar* case. It is true that the stipulation in the *Mavar* case, apparently a so-called friendly suit, goes further in favor of the defendant than the

stipulation in the case at bar. Where it does, however, it relates to questions of law which would not, of course be controlling on the court. Consequently, in resolving the issue of coverage here, the difference in the stipulations may be disregarded.

Judgment for defendant.

United States Court of Appeals for the Fifth Circuit

No. 15051

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

MYRTLE GROVE PACKING COMPANY, APPELLEE

On Appeal From the United States District Court for the Eastern District of Louisiana

January 12, 1955

PER CURIAM: Affirmed. *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F. 2d 409.

United States Court of Appeals for the Fifth Circuit

No. 13419

July 17, 1951

DONNELY ET AL. *v.* MAVAR SHRIMP & OYSTER CO., ET AL.

Appeal from the United States District Court for the Southern District of Mississippi

Before HOLMES, BORAH and RIVES, *Circuit Judges.* HOLMES, *Circuit Judge.*

This action is brought under the Declaratory Judgments Act, as amended, which is contained in Chapter 151 of the Federal Judicial Code of 1948, as amended by the Act of May 24, 1949. See Title 28 of U. S. Code, Sections 2201 and 2202. Federal jurisdiction is based solely on diversity of citizenship, and the amount involved exceeds $3,000 exclusive of interest and costs. This appeal is from a judgment declaring the rights and legal relations of the parties under Section 213 (a) (5) of Title 29 United States Code.

The Declaratory Judgments Act is a procedural statute that provides an additional remedy for use in cases of which the federal courts already have jurisdiction; it should be given a liberal construction. The procedure is expressly recognized in Fed. Rules Civ. Proc. rule 57, 28 U. S.

C. A., which says that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate; also that the court may order a speedy hearing of an action for declaratory judgment, and may advance it on the calendar. See *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123,* 5 Cir., 137 F. 2d 176, affirmed in 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949; *Gully* v. *Interstate Natural Gas Co.,* 5 Cir., 82 F. 2d 145; *Mississippi Power & Light Co.* v. *City of Jackson,* 5 Cir., 116 F. 2d 924; Borchard, Declaratory Judgments, pp. 619–621.

We have no doubt that this case involves an actual justiciable controversy, which in the interest of justice should be speedily heard and determined in accordance with the letter and spirit of the just cited rule. Delay in adjudicating this controversy might be financially disastrous to many small operators in the shrimp and oyster industry. Said Section 213 (a) (5), as amended, exempts from the minimum wages and maximum hours provisions of the Act any employee engaged in the catching or cultivating of any kind of fish, shellfish, or other aquatic forms of animal and vegetable life, including packing of such products for shipment, "processing (other than canning)", marketing, freezing, curing, storing or distributing, the above products, or byproducts thereof. The word processing, as used in the exempting clause, includes a series of acts, events, and occurrences, which are necessary to transform raw seafood into an edible commercial product. The statute excludes from the minimum wages and maximum hours provisions of

the Act every one of the acts and progressive steps, except canning, included in the term processing.

Canning includes hermetically sealing, and sterilizing or pasteurizing, and every other operation necessarily performed on the products before they are placed in cans, bottles, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers; also included are subsequent operations such as the labeling of the cans or other containers, and the placing of the sealed containers in cases or boxes, whether such subsequent operations are performed as a part of an uninterrupted or interrupted process. Every other act or step in catching, curing, marketing, and distributing aquatic products is embraced in the exemption clause except only those especially performed upon the products for the purpose of canning. All the preparatory things are excluded from the act that can be and are done when canning is not intended or contemplated; and all the subsequent operations are excluded, as a matter of course, when canning has not actually taken place. Catching, freezing, curing, shelling, or shucking, shrimp or oysters, constitutes no part of the canning process. Corn is sometimes shucked in the field, and pecans are often shelled without canning. Wringing its neck and plucking its feathers are primary but separable processes in cooking a chicken, and all three are processes other than canning. The primary processes in the silk industry are performed in Asia, and the partially processed silk product is by law imported, duty free, into the United States. Gin-

ning is the primary process in the cotton textile industry, but a cotton gin is distinguishable from a textile mill. A corn shucker is not a miller, and a shrimp picker is not engaged in canning shrimp any more than a corn shucker is engaged in canning corn. The least that can be said is that the processes are separable; and that the Act so contemplated is indicated by retaining the exemption as to processes other than canning.

If picking shrimp and shucking oysters are not exempted, what are the processes other than canning that were in the legislative mind? Catching, cultivating, curing, storing, freezing, and marketing, are without qualification specifically exempted from the wages and hours law. What, then, we repeat, are the processes (other than canning) that the amendment intended to exclude from the exemptions if the actual canning retroactively embraced everything previously done to the product except catching, curing, storing, freezing, and marketing? The position and punctuation of clause (5) in paragraph (a) of Sec. 213, Title 29, indicate that the parenthetical words (other than canning) modify only the preceding word "processing" and not the words "marketing, freezing, curing, storing, or distributing." Curing means to prepare for preservation or permanent keeping; to preserve as to cure beef or fish. See Webster's Dictionary. We must give full effect to all the words used by the Congress; to do this means that preparing shrimp or oysters for preservation or permanent keeping is exempted from the provisions of both Sections 206 and 207 of said Title 29. These appellants are not engaged in canning; they do

not work in the canning room; their work is frequently done without any intention on the part of their employer to can the articles that are being processed; they are engaged in a process involving shrimp and oysters that is distinct from, not necessarily related to, and often not succeeded by, canning. *Cochrane* v. *Deener,* 94 U. S. 780, 788, 24 L. Ed. 139; *Waldman* v. *Swanfeldt,* 9 Cir. 66 F. 2d 294, 295; *Henry* v. *Markesan State Bank,* 8 Cir., 68 F. 2d 554, 557; *Waller* v. *Humphreys,* et ux., 5 Cir., 133 F. 2d 193; *McComb* v. *Consolidated Fisheries Company,* 3 Cir., 174 F. 2d 74; *Cincinnati Soap Company* v. *United States,* D. C., 22 F. Supp. 141, 143; *State* v. *Pacific American Fisheries,* 73 Wash. 37, 131 P. 452–454.

The statute recognizes that, in obtaining and offering shrimp and oysters for sale for use as food, it is necessary to cultivate them, catch, cure, freeze, pack, can, or otherwise transform, them into a marketable product. Prior to 1949, Section 213 (a) (5) exempted every act of an employee in catching, curing, canning, cultivating, and marketing, any kind of shellfish or other aquatic forms of animal and vegetable life. In 1949, Section 213 (a) (5) was amended so as to exclude canning from the exemption, but it left the exemption intact as to every other distinct act and feature of the industry that was necessary to convert the raw material of aquatic life into a marketable product. As used in the statute, processing is an inclusive word that embraces all the acts necessary to improve the material and convert it into an edible product. The amendment of 1949 did not strike the word

processing out of the exempting clause (as it might have done), but limited its scope and effectiveness only to acts and doings other than canning. The act of canning is only one of several processes necessary in turning the aquatic material into food fit for human consumption. We must ascribe to the legislative mind some reason for leaving the word processing (other than canning) in the exemption clause of said Section 213 (a) (5). What are processes other than canning are questions of fact to be decided upon the special characteristics of the process or operation of the particular business or industry.

The findings of fact by the district court are not clearly erroneous; and the judgment appealed from is affirmed.

Affirmed.

RIVES, *Circuit Judge* (dissenting).

In arriving at what is included in "canning," I do not think that the word "processing" in the exempting clause of the 1949 amendment is significant, because at the same time Section 213 (b) (4) was added providing an exemption from the overtime requirements only for "the canning of any kind of fish, shellfish, * * *," and there the word "processing" was not employed. It seems apparent that the overtime exemption was intended as a substitute for the complete exemption previously provided in Section 213 (a) (5) for "any employee employed in * * * canning."

Canning is just one form of processing and to exclude everything included in the broader term would leave to canning a very limited meaning. I think that canning includes the necessary preparation of the product performed as an

integral part of a continuous uninterrupted process even though the same preparation might be necessary to make the product edible without canning. That the product must be shucked, cleaned, peeled, and cooked before it is eaten at all does not remove those operations from canning when they are performed in connection with canning and as a part of that process. Exemptions from this Act must be "narrowly construed" and extended only to "those plainly and unmistakably within its terms and spirit." *A. H. Phillips Co.* v. *Walling,* 324 U. S. 490, 493, 65 S. Ct. 807, 808, 89 L. Ed. 1095.

Nevertheless, upon the record before us, I would concur in the result if I could bring myself to believe that the case presents an actual controversy. To my way of thinking, it is plainly a "friendly" suit "in which there is no actual antagonistic assertion of rights." *C. I. O.* v. *McAdory,* 325 U. S. 472, 475, 65 S. Ct. 1395, 1397, 89 L. Ed. 1741. A careful study of the record leads me inescapably to the belief that both sides desired the same result to the proceeding and gave the Court not the slightest chance of arriving at a contrary conclusion.

The plaintiffs are two companies engaged in the commercial canning of shrimp and oysters as well as in their taking and harvesting, cleaning and processing. The defendants are eighteen "casual workers" of the plaintiffs selected by the plaintiffs themselves out of a total of about 400 laborers. We must know in reason that the defendant casual workers had no considerable funds with which to employ counsel. Upon oral argument when plaintiffs' counsel praised the

generosity of defendants' counsel in representing his clients without charge, defendants' counsel shook his head, but it is hard to say whether that was in denial of the praise or in disapproval of the propriety of the observation in open Court.

The complaint alleged in paragraph 3 that "none of the defendants above named, at any time during the period hereinabove recited was engaged in the canning of sea foods or aquatic products." The defendants admitted the allegations of paragraph 3 of the complaint. Thereby they literally admitted themselves out of Court. Further the defendants in their answer admitted that the functions which they performed (picking of shrimp and shucking of oysters) "are separate, distinct, and have no immediate relationship" to the canning, and further "that the canning * * * is separate, distinct, unrelated to and apart from the original process in which the shrimp or oysters are received at the wharf, going through a distinct and intricate process by which they become merchantable food prior to any of the actual processes needed or required in canning." The only allegations of the complaint which the defendants denied were the conclusions of the pleading with reference to the meaning of the law.

If we would assume that the admissions in the defendants' answer were made unintentionally or by oversight we have but to examine the evidence. A single witness testified for the plaintiffs, the superintendent of one of their plants. He first testified favorably to the defendants as follows:

"Q. Now, before the Court today, Mr. Mavar, is whether or not the shucking of oysters, that is, the operation beginning at the pier and ending at the pay-off window, if that is a necessary part of the canning of oysters. Do you know anything about that—I mean, are you acquainted with that? A. Yes, sir, that is a part of the canning."

The defendants made no point of this admission, but permitted plaintiffs' counsel by leading questions to get the witness to conform his testimony to the plaintiffs' case.

The plaintiffs had "other witnesses who would testify to substantially the same thing as this witness," and naturally the Court saw no necessity of examining the other witnesses. So the plaintiffs rested.

The defendants called two witnesses, both women, one the President and the other the Secretary and Treasurer of the Seafood Workers Association, a union that was supposed to represent the defendants.

The President expressed her complete accord with, and volunteered to make a moving speech for, the plaintiffs in the following answers:

"Q. If you paid them all the same 75¢ an hour, many of them would only pick about 10 pounds an hour? A. Right.

"Q. Then you would be paid 75¢ an hour for only 40¢ an hour? A. That's right. And, may I say this, that our workers don't want that. They want to earn what they can earn. We have a good many old workers in our plant, who have grown old in service. They can go in these plants, and they are permitted to go and come as they

please. They can work three or four hours and go on home, and they thank God every night of their life that they were permitted to earn that day. They are satisfied and don't expect to make as much as the fast workers. Everybody is satisfied with what they can earn."

The Secretary-Treasurer was scarcely less zealous than the President in her accord with the plaintiffs:

"Q. I want to ask if there is anything that you know about this lawsuit with reference to the wages of employees, piece working employees, you care to state in any manner, of the desires in this case; have you got any information you care to give the Judge? A. We would like to work like we did in the past, which has been the method of our grandmothers and grandfathers. In piece work you earn what you can, a scale of work set by the association and then brought to a meeting with the packers. We would like to work like we did in the past."

The sensible precaution was observed by defendants' counsel of examining several of the defendants themselves, but simply as to their conclusions of whether the President and the Secretary-Treasurer of their organization had testified truthfully, accurately and correctly. In each instance the defendant witness answered yes, and that if asked all the questions the answers would be the same. That was all of the testimony for the defendants.

Small wonder that the Court found it necessary to inquire from defendants' counsel:

"By the Court:

"Let me ask you, Mr. Adam. As I understand it these defendants are really demanding the minimum wage if they are covered by it?

"By Mr. Adam, Counsel for Defendants:

"Yes. We claim they come in under the wage and hour law."

On appeal, this Court's responsibility is the more grave in that if the majority is in error, that error will probably not be corrected because the *amicus curiae* can go no further and the parties seem to be of a single mind.

If this judgment merely concluded the eighteen named defendants it would be bad enough, but when we consider that it concludes also "all persons working for the plaintiffs who are similarly situated with the defendants," and that the plaintiffs employ about 400 laborers and further that it sets a pattern for the future and affects persons to be employed in the days to come, and when we still further consider the use of this case as a precedent either by the Administrator or by the Courts, then, if the Court decides this case without the safeguard of adequate presentation of all questions of law and fact by actual antagonistic parties, it is clear that the Court itself might become the instrument of working an injustice. The effect of the decision in this case that shuckers of oysters and cleaners of shrimp are exempt wholly instead of partially from the Wage and Hour Law is relatively unimportant compared to the danger of the precedent set when we take jurisdiction of a case that involves no actual controversy.

In declaratory judgment actions such as this there are involved the interests not only of the em-

ployers who are parties and their employees, but also of competing employers and their employees, and still further those of the public. *Tennessee Coal Iron & R. Co.* v. *Muscoda Local,* D. C., 40 F. Supp. 4, affirmed 5 Cir., 135 F. 2d 320, rehearing denied, 5 Cir., 137 F. 2d 176, affirmed 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949, is taken as a precedent for this action. That case was hotly contested; counterclaims on behalf of the employees were filed and were successfully prosecuted. There was no counterclaim in the case now before the Court. In the *Muscoda* case the administrator intervened in the District Court and hence the interests of the public and of competitors were represented. Appearance of the Administrator as *amicus curiae* in the appellate court, though helpful, is not sufficient, for the record on which the case must be decided is concluded in the District Court.

If the decision in the instant case stood without dissent, I anticipate that a number of similar suits would be filed, and that in most of them the friendly nature of the suit would not be so self evident as in this case. It seems to me that in the exercise of the discretion vested in a district court, it should refuse to proceed with such a declaratory judgment action in the absence of the Administrator to represent the interests of competing employers and employees and of the public.

I think that the judgment should be reversed with directions to the district court to dismiss the cause unless the Administrator becomes a party, and therefore I respectfully dissent.

APPENDIX B

Statutory Provisions Involved

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

Section 6 (a) as amended:

Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) Not less than 75 cents an hour;

* * * * *

Section 11 (c):

Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * *

Section 13 (a) (5) prior to amendment:

The provisions of sections 6 and 7 shall not apply with respect to * * * (5) any

employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof;

* * * * *

Section 13 (a) (5) as amended:

The provisions of sections 6 and 7 shall not apply with respect to * * * (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other acquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing, or distributing the above products or byproducts thereof;

* * * * *

Section 13 (b) (4), as added by the 1949 Amendments:

The provisions of section 7 shall not apply with respect to * * * (4) any employee employed in the canning of any kind of fish, shellfish, or other acquatic forms of animal or vegetable life, or any byproduct thereof * * *.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Summary of argument	8
Argument:	
Cannery employees performing necessary preparatory operations as an integral part of the canning process are employed in "canning" to which Congress extended minimum wage protection in 1949	10
A. Both the express language used in the 1949 amendments and the legislative reports show that the term "canning" includes closely integrated preparatory work	12
B. The term "processing (other than canning)" covers many types of operations and is not rendered meaningless by excluding the closely integrated preparatory work here involved	15
C. In construing "canning" so as to exclude closely integrated preparatory work, the court below has failed to apply appropriate standards for interpreting the Act's remedial coverage provisions	17
Conclusion	20

CITATIONS

Cases:

Addison v. *Holly Hill Co.*, 322 U.S. 607	19
Alstate Construction Co. v. *Durkin*, 345 U.S. 13	9, 18
Donnely v. *Mavar Shrimp & Oyster Co.*, 190 F. 2d 409	10, 11, 15, 17
Fleming v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52	17

Cases—Continued

Page

Maneja v. *Waialua Agricultural Co.*, 349 U.S. 254.. 9, 18
Phillips Co. v. *Walling*, 324 U.S 490..... 10, 19
Powell v. *United States Cartridge Co.*, 339 U.S. 497 ..... 10, 19
Tobin v. *Blue Channel Corp.*, 198 F. 2d 245, 8, 9, 11, 12, 13, 15, 16, 19

Statutes:

Fair Labor Standards Act, 52 Stat. 1060:

Section 6 3
Section 7 3
Section 13(a)(5) 2, 12

Fair Labor Standards Act, as amended, 63 Stat. 910:

Section 13(a)(5) 3, 8, 10, 12, 16, 19
Section 13(b)(4) 3, 4, 8, 10, 12, 19

Miscellaneous:

95 Cong. Rec. 14932-33; 14874; 14878..... 9, 13, 14
Fishery Statistics of the United States 1951, Fish and Wildlife Service, United States Department of the Interior, Washington, D. C., pp. 41-42, 289 16
Interpretative Bulletin No. 14, par. 34, originally issued August 21, 1939, 1940 WH Man. 180, 194; 1951 WH Man. 35:351, 365; Release M-10, dated February 14, 1947, 1951 WH Man. 35-62..... 18
Shrimp and Oyster Canning in the Gulf Area, Wage and Hour and Public Contracts Division of the United States, Department of Labor, February, 1951, unpublished..... 4

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 44

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MYRTLE GROVE PACKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 82-85) are reported at 117 F. Supp. 599. The *per curiam* opinion of the Court of Appeals (R. 88) is reported at 217 F. 2d 952.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1955 (R. 88-89). The petition for a writ of certiorari was filed April 7, 1955, and

was granted May 23, 1955 (R. 96). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether employees who remove the shell from seafoods as an integrated step in the continuous and uninterrupted process of canning these products are employed in "canning", which Section 13 (b)(4) of the Fair Labor Standards Act exempts from the overtime but not from the minimum wage provisions of that Act, or are employed in "processing (other than canning)", which Section 13 (a)(5) exempts from both the overtime and minimum wage provisions.

STATUTE INVOLVED

1. As originally enacted, Section 13(a)(5) of the Fair Labor Standards Act, 52 Stat. 1060, 1067, 29 U.S.C. (1946 ed.) 213(a)(5), exempted from both the wage and hour requirements of the Act persons employed in various phases of seafood production including the "processing" and "canning" of such products. Section 13(a)(5) provided:

> The provisions of sections 6 and 7 shall not apply with respect to * * * (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the load-

> ing, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof;

Sections 6 and 7 of the Act, referred to in this section, provide respectively for minimum wages and for overtime pay.

2. In 1949, Section 13(a)(5) was amended by the Fair Labor Standards Amendments, 63 Stat. 910, 917, 29 U.S.C. (1952 ed.) 213(a)(5), so that "canning" was deleted from this list of exempted activities and "processing" was qualified by inserting immediately after that term the parenthetical phrase "(other than canning)", the section now providing:

> The provisions of sections 6 and 7 shall not apply with respect to * * * (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freeezing, curing, storing, or distributing the above products or byproducts thereof;

At the same time a new provision, Section 13(b)(4), was added, 63 Stat. 918, 29 U.S.C. (1952 ed.)

213(b)(4), providing an exemption from the overtime compensation requirement, but not from the minimum wage, for the "canning" of seafood products. It provides:

> The provisions of section 7 shall not apply with respect to * * * (4) any employee employed in the canning of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof;

STATEMENT

This action was brought in 1952 by the Secretary of Labor, under Section 17 of the Fair Labor Standards Act, in the Eastern District of Louisiana to enjoin respondent from violating the minimum wage and record-keeping provisions of the Act. The employees concerned peel the shrimp and shuck the oysters in respondent's shrimp and oyster canning plant as an integrated step in the continuous and speedy process which is used in canning these products.[1]

The facts found by the District Court (R. 83-84) are based upon a stipulation of the parties (R. 26-28) and the undisputed testimony of respondent's vice-president (R. 31-51, 68-82) and of its plant manager (R. 52-67). These findings may be summarized as follows:

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[1] Employees performing such necessary preparatory work constitute some 75 to 90% of the production workers in shrimp and oyster canning plants. *Shrimp and Oyster Canning in the Gulf Area*, Wage and Hour and Public Contracts Division of the United States Department of Labor, February 1951, unpublished.

Respondent is the Myrtle Grove Packing Company, a Louisiana corporation, which is almost exclusively engaged in the business of canning shrimp and oysters for interstate commerce (R. 83-Fdg. 1; R. 26-27). During the period from January 1, 1951, to September 30, 1952, which was stipulated and found to be "typical" of respondent's "operations and practices" (R. 83-Fdg. 1; R. 27), respondent's sales of canned shrimp and oysters amounted to $930,356.34 and constituted 97.67% of its total sales (R. 83-Fdg. 1; R. 28).[2] "Substantially all of the shrimp and oysters handled (approximately 95%)" are produced for interstate commerce (R. 83-Fdg. 1; R. 26).

Respondent organized its canning operations as a continuous process, in which the peeling and shucking of the shrimp and oysters was but one of a number of closely integrated steps (R. 83-Fdg. 2-7; R. 84-Fdg. 8-15). Thus "the total elapsed time from the time the shrimp are dumped on the table to be peeled to the completion of the final sterilization of the cans, is about one to two hours" (R. 84-Fdg. 14); and "the entire handling of oysters" from "the beginning of the steaming process to the completion of the final sterilization of the

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[2] In only one of the seven quarterly periods included in the stipulation did respondent sell any shrimp or oysters processed by a method other than canning, and such sales amounted to $7,569.05, or only 0.8 of 1%, of respondent's total sales (R. 28). The balance of respondent's sales, 1.53% of the total, consisted of shrimp and oysters sold in the shell with no processing whatever (R. 28), such sales ordinarily being made only when the supply available was too small to justify employing a canning crew (R. 37).

hermetically sealed cans requires only about two hours" (R. 83-Fdg. 7). Once the canning of the shrimp or oysters is begun they are not held at any step except to accumulate a sufficient quantity to begin the next step (R. 84-Fdg. 8, 15).

The first step in the canning of oysters is to cook them partially by steaming in retorts for five to ten minutes, a step which "is used only when the oysters are to be canned" (R. 83-Fdg. 3). "Following such steaming, the oysters are then dumped into tubs, partially opened and cooked and are removed from the shuck by the employees here involved" (R. 83-Fdg. 4). After a shucker weighs the oysters he has shucked to determine his piece rate earnings, they are dumped into a tub for washing (R. 83-Fdg. 4), and are then floated into another room where they are inspected, placed in a brine tank, and reinspected (R. 83-Fdg. 5). The oysters are then carried to the "packing room" where they are placed in cans, sealed, and subjected to further heat treatment (R. 83-Fdg. 6). The court specifically found that respondent "desire[s] and * * * attempt[s] to make the handling of the oysters in the manner above set forth a continuous process" (R. 84-Fdg. 8).

Shrimp are canned in accordance with a very similar procedure. They "are first dumped, raw, on a table where the employees here involved remove the edible portions" (R. 84-Fdg. 10).[3] They

[3] The piece rate earnings of these employees are determined by weighing the inedible portions which they have removed (R. 84-Fdg. 12).

are then floated in flumes to an inspection belt, inspected, and cooked in a blanching tank (R. 84-Fdg. 11). After reinspection and grading for size, they are carried to the "packing room" where they are placed in cans, sealed and heat treated (R. 84-Fdg. 13). The court again specifically found that respondent "desire[s] * * * and every effort is expended to make the process a continuous one" (R. 84-Fdg. 15).

The testimony of respondent's vice-president emphasized the complete integration between the preparatory work performed by the employees here involved and the actual placing of the seafood into cans. He testified that "for all practical purposes" respondent Myrtle Grove had "done nothing but can" shrimp and oysters since the opening of its plant in 1946 or 1947 (R. 47, 50) and had not to his knowledge ever canned "shrimp or oysters that were shelled or picked somewhere else" (R. 48). In addition he conceded that the handling of both oysters and shrimp had been organized "as a continuous operation" (R. 36); that the oysters were "immediately flumed into the packing room" as soon as the shucker had finished and weighed each pail on which he worked (R. 33-34); and that the shrimp were similarly handled (R. 35-36).

The District Court held for respondent and dismissed the complaint (R. 85), on the sole ground that "[i]ndependent consideration of this case by this court is precluded by the decision of the United States Court of Appeals for the Fifth Circuit in

Donnely v. *Mavar Shrimp & Oyster Co.*, 190 F. 2d. 409" (R. 84-85). The Court of Appeals affirmed in a one line *per curiam* opinion (R. 88) citing only its *Donnely* decision.[4]

SUMMARY OF ARGUMENT

The 1949 amendments to the Fair Labor Standards Act extended minimum wage benefits to employees engaged in "canning" seafoods and related products and limited the exemption theretofore granted to employees engaged in "processing" to those engaged in "processing (other than canning)." When these amendments are analyzed, it becomes evident that the Fourth Circuit in *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245, correctly decided that cannery employees, performing necessary preparatory operations as an integrated step in the continuous and speedy process used in canning seafood, were engaged in "canning" and not in "processing (other than canning)." The decision below, which reached a contrary conclusion, is erroneous and should be reversed.

A. The plain meaning and express legislative purpose of the exemptions in issue support the Fourth Circuit's *Blue Channel* holding that the term "canning" includes necessary preparatory work of the type here involved. The obvious design of the 1949 amendments, in changing Section 13(a)(5) and adding Section 13(b)(4), was to extend the minimum wage benefits of the Act to work-

[4] Both the majority and dissenting opinions of the Fifth Circuit in the *Donnely* case are included in full in the printed record of the case at bar (R. 89-96).

ers in the fishery and seafood industries employed in "canning." If there were any doubt that the term "canning" was meant to include necessary preparatory operations, it is specifically resolved by the legislative reports. The amendments, as enacted, were agreed on by a conference committee, and the reports of both Senate and House Conferces expressly stated that "canning" includes "necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers." 95 Cong. Rec. 14932-33; 14878.

B. The decision below rests solely on the erroneous assumption that the term "processing (other than canning)" in Section 13(a)(5) would be meaningless if not construed to embrace preparatory operations such as picking and shucking. As the Fourth Circuit pointed out in *Blue Channel:* "Certainly, scores of situations could be mentioned in which products are processed but not canned." 198 F. 2d at 248. The exemption for "processing (other than canning)" has substantial practical meaning and ample scope for operation apart from the preparatory operations necessary for canning.

C. The consistent administrative interpretation of the term "canning," both prior and subsequent to the 1949 amendments, is in accord with the Fourth Circuit's decision. The failure of Congress to disturb this administrative construction at the time of the 1949 amendments confirms its validity. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13. Moreover, the Fifth Circuit's broad construction

of Section 13(a)(5) and narrow construction of Section 13(b)(4) is diametrically opposed to this Court's repeated rulings that exemptions from this remedial legislation must be narrowly construed and its coverage provisions liberally construed. *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 517.

ARGUMENT

Cannery Employees Performing Necessary Preparatory Operations as an Integral Part of the Canning Process Are Employed in "Canning" to Which Congress Extended Minimum Wage Protection in 1949.

The 1949 amendments to the Fair Labor Standards Act *supra*, pp. 3-4, extended minimum wage benefits to employees engaged in "canning" seafoods and related products and limited the exemption theretofore granted to employees engaged in "processing" to those engaged in "processing (other than canning)." In applying these amendments, a square conflict has developed between the Fourth and Fifth Circuits as regards cannery employees engaged in the regular and necessary preparatory work of removing the shell and other inedible portions of seafood as part of the continuous, speedy, and uninterrupted process normally used by respondent and other cannery operators in the production of canned seafood. The Fifth Circuit, in the instant case and in its earlier decision in *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F.2d 409, concluded that such cannery employees were engaged in "processing (other than canning)" and thus excluded from minimum wage benefits. The

Fourth Circuit in *Tobin* v. *Blue Channel Corp.*, 198 F.2d 245, held that these employees were engaged in "canning" and, therefore, entitled to the protection of the Act.

Donnely v. *Mavar Shrimp & Oyster Co., supra,* unlike the instant case, was a declaratory judgment action instituted by employees. As pointed out by Judge Rives in his dissenting opinion in that case, 190 F.2d at 412-414 (R. 92-96), the Government was not a party to the litigation, which appeared to be "plainly a 'friendly' suit" in which "both sides desired the same result" (R. 92-93). The parties there had in effect stipulated the very issue in controversy in the instant case by agreeing that none of the employees involved was "engaged in the canning of sea foods or aquatic products," and that the picking of shrimp and the shucking of oysters "are separate, distinct, and have no immediate relationship" to canning (R. 93). On the basis of this factual concession made by the parties, a majority of the panel which sat on that case concluded (R. 89-92) that such employees were engaged in "processing (other than canning)" within the meaning of Section 13(a)(5) rather than "canning" within Section 13(b)(4).

Tobin v. *Blue Channel Corp., supra,* in which the Fourth Circuit reached a contrary result, was brought by the Secretary of Labor. In a unanimous opinion, that court carefully reviewed both the legislative history of the 1949 amendments and the factual data regarding the close integration of each step in the canning process. The

majority decision in *Donnely* was considered and rejected as erroneous. The court held that cannery employees who removed crab meat from the claws of the crab preparatory to its being placed in cans were employed in "canning" within the meaning of the amended Act. Pointing out that "extracting the crab meat from the claws, is an early and preparatory, but none the less an essential and integrated, step in the continuous and uninterrupted process of canning crabmeat," the court recognized that it could not "view the necessary preparatory operations of the claw pickers in picking and sorting the crabmeat in isolation from the canning process as a whole." 198 F.2d at 248.

A. Both the Express Language Used in the 1949 Amendments and the Legislative Reports Show that the Term "Canning" Includes Closely Integrated Preparatory Work.

Prior to 1949, persons employed in various aspects of the production of seafood and related products, including "processing" and "canning," were exempted by Section 13(a)(5) of the Fair Labor Standards Act, *supra,* pp. 2-3, from both the minimum wage and overtime requirements of that Act. In 1949 the Act was amended, by the addition of a new Section 13(b)(4), *supra,* p. 4, to extend minimum wage benefits to employees engaged in "canning" such products. At the same time, by amendments made to Section 13(a)(5), *supra,* p. 3, the word "canning" was deleted from this section and the exemption applicable to those employed in "processing" was limited to "processing (other than canning)."

The decision in the *Blue Channel* case is in direct accord with both the normal meaning of these terms and with the express purpose of the statute in which they appear. The obvious design of the amendments was to extend the minimum wage benefits of the Act, but not the overtime provisions, to those workers in the fishery and seafood industry employed in "canning." To make it unmistakably clear that the complete exemption would no longer apply to canning, the generic word "processing" was expressly qualified by the insertion of a parenthetical phrase which can have had no purpose other than to preclude its extension to anything properly included in the term "canning."

If there were any doubt as to the meaning of these amendments, insofar as concerns the integrated preparatory operations here involved, it is resolved by the legislative reports. Both the form and the substance of the Section 13(a)(5) and Section 13(b)(4) exemptions were the work of the Conference Committee which expressly explained that "canning" includes "*necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers*". 95 Cong. Rec. 14932-33. (Emphasis added.)

As originally adopted by the House of Representatives and the Senate, the amendments had differed in their treatment of fish canning. The Senate amendment made no change in the 1938 Act in this particular. The House bill provided a 14-workweek exemption for any industry engaged in the first processing or canning of fish in the raw or

natural state. The bills were then referred to a conference committee to reconcile the differences (95 Cong. Rec. 14932). The compromise bill as agreed on by this committee was adopted and enacted into law. The unanimous report of the House conferees, explaining this bill to the House of Representatives before it was adopted by that body, said with respect to the activities embraced in the word "canning":

> * * * Under the conference agreement "canning" means hermetically sealing and sterilizing or pasteurizing and has reference to a process involving the performance of such operations. It *also means other operations performed in connection therewith such as necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers.* Also included are subsequent operations such as the labeling of the cans or other containers and the placing of the sealed containers in cases or boxes whether such subsequent operations are performed as a part of an uninterrupted or interrupted process. [95 Cong. Rec. 14932-33; emphasis added.]

The same description of "canning" appears in the statement submitted by a majority of the Senate Conference. 95 Cong. Rec. 14874, at 14878.

Under the restrictive interpretation of the term

"canning" adopted by the court below, minimum wage protection is accorded only to those canning plant employees who work in the "packing room" (R. 83-Fdg. 6; R. 84-Fdg. 13) where the food is actually placed in the cans and hermetically sealed. Such protection is denied to cannery employees who work in rooms adjoining the "packing room" performing necessary preparatory work on the food about to be placed in the cans and immediately before it is given its final handling by the "packing room" crew. This distinction not only does violence to the normal meaning of the term "canning," but is squarely contrary to the legislative purpose manifested by the 1949 amendments and the accompanying congressional reports. This is particularly so where, as here and in *Blue Channel*, "canning is the main objective * * * and * * * is accomplished by a continuous series of operations" (198 F.2d at 248).

B. The Term "Processing (Other Than Canning)" Covers Many Types of Operations and Is Not Rendered Meaningless by Excluding the Closely Integrated Preparatory Work Here Involved.

In *Donnely*, the court below expressly noted the congressional object of including within the term "canning" "every other operation necessarily performed on the products before they are placed in cans" (R. 90; 190 F. 2d at 411), but declined to give it effect as regards the peeling and shucking operations here involved. Its exclusion of these operations seems to rest solely on an erroneous factual assumption that the phrase "processing (other

than canning)" used in Section 13(a)(5), as amended, *supra*, p. 3, would be meaningless if not construed to embrace peeling and shucking.

As the Fourth Circuit pointed out in *Blue Channel*, "[c]ertainly, scores of situations could be mentioned in which products are processed but not canned." 198 F. 2d at 248. One ready example of the very substantial meaning and practical importance of the exemption for "processing (other than canning)" is the filleting of fresh fish. Another is the production of oil and meal from menhaden and other fish.[5] Neither the extracting and rendering of oil from the fish nor the filleting of fresh fish is included in the specifically mentioned operations—other than "processing"—exempt under Section 13(a)(5). Furthermore, the terms of the exemption itself show that it applies to many products which are processed in ways not involving freezing, curing, storing or canning. Its terms embrace not only fish, but also "sponges, seaweeds, or other aquatic forms of animal and vegetable life". Thus, the general word "processing" may apply to such activities as the drying of seaweed preparatory to the manufacture of agar and to the drying and cleaning of sponges.

The processes applied to the materials mentioned in Section 13(a)(5) are, therefore, many

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[5] "Practically the entire 1951 menhaden production was used in the manufacture of oil and meal." *Fishery Statistics of the United States 1951*, Fish and Wildlife Service, United States Department of the Interior, Washington, D. C., p. 289. The value of such oil and meal was $23,650,677. *Ibid.*, pp. 41-42.

and varied. The reasonable construction of the word "processing", as used in that section, would seem to include all of such processes, though not specifically named, except the process of canning, which has been specifically excluded. This interpretation gives the word "processing" the meaning which context and legislative history require, without distorting the ordinary meaning of the term "canning."[6]

C. In Construing "Canning" So as to Exclude Closely Integrated Preparatory Work, the Court Below Has Failed to Apply Appropriate Standards For Interpreting the Act's Remedial Coverage Provisions.

The decision below, and that in *Donnely*, is also inconsistent with well-established principles, repeatedly emphasized in the decisions of this Court, for interpreting the Fair Labor Standards Act. These two Fifth Circuit decisions totally ignore the long-standing and directly pertinent administrative interpretation of the term "canning" as used in the Act both prior and subsequent to the

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[6] The fishing industry itself has regarded "processing" as a generic term including various methods of preparing its products for market, among which are "canning," "filleting", "extracting of oil", and "manufacturing of meal". See *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, 57 (C.A. 8), quoting the industry's definition of the term in its NRA Code:

> The term "processing" means the packing in ice of, filleting of, cutting of, freezing of, salting of, smoking of, drying of, canning of, extracting oil from, manufacturing meal or fertilizer from, products of the industry; or otherwise manipulating products of the industry; * * *.

1949 amendments. They also adopt an approach squarely opposed to this Court's repeated holdings that the Act's coverage provisions should be read liberally and its exemptions narrowly.

The consistent administrative interpretation of the term "canning", first adopted in 1939, has been that it "includes the necessary preparatory operations performed * * * before the commodities are placed in bottles, cans, or other hermetically sealed containers * * *. These operations may include all types of preparations of the product, such as heating, cooking, peeling, s[illegible]eezing, cutting, cleaning, mixing, etc."[7] Significantly, this was the administrative construction even where its effect was to extend the scope of the various exemptions for "caning" prior to the 1949 amendments, it being recognized that any reasonable interpretation of the term should include such necessary preparatory operations. If the somewhat broader construction of the term was warranted when it resulted in extending the scope of an exemption, there is certainly no justification for abandoning it when it operates to liberalize the scope of coverage of the minimum wage. The validity of the Administrator's construction is confirmed by the fact that it was left unaltered by Congress in the 1949 amendments. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17.

[7] Interpretative Bulletin No. 14, par. 34, originally issued August 21, 1939, 1940 WH Man. 180, 194; 1951 WH Man. 35;351, 365; Release M-10, dated February 14, 1947, 1951 WH Man. 35-62.

The decision below gives the broadest possible scope to the complete exemptions of Section 13(a)(5) and construes as narrowly as possible the language of Section 13(b)(4), which was enacted to extend the coverage of the minimum wage provisions of the Act. As the Fourth Circuit said of the latter provision in *Blue Channel:* "We are here dealing with a remedial statute. Its terms of coverage should therefore, be liberally rather than narrowly construed". 198 F. 2d at 248. The Fifth Circuit's approach is thus diametrically opposed to this Court's repeated and consistent rulings that "[a]ny exemption from such humanitarian and remedial legislation must * * * be narrowly construed", and its coverage provisions liberally construed. *Phillips Co.* v. *Walling,* 324 U.S. 490, 493; *Addison* v. *Holly Hill Co.,* 322 U.S. 607, 617; *Powell* v *United States Cartridge Co.,* 339 U.S. 497, 517.

CONCLUSION

The decision and judgment of the Fifth Circuit should be reversed, and the case remanded to the District Court with directions to enter a decree for petitioner.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 44

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

MYRTLE GROVE PACKING COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT, MYRTLE GROVE PACKING COMPANY.

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SUBJECT INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	5

Argument:

Oyster shuckers and shrimp pickers, while performing a process that effectually changes natural edible and live shrimp and oysters into a commodity that could be canned, were not necessarily involved in a process of canning. The whole question in this case revolves around the meaning of the words used by the Congress in its 1949 Amendment to the Fair Labor Standards Act 7

A. Nothing in the language of the 1949 amendment or the legislative reports is repugnant to the opinion in the Donnelly case 10

B. Any reasonable construction of the word "processing" as used in the exemption, shows that such processing was qualified only by the actual act of canning as ordinarily understood 13

SUBJECT INDEX—(Continued).

Page

C. The Donnelly case in its construction of the parenthetical word "canning" as used in the exemption does nothing to affect the remedial purposes of the Fair Labor Standards Act 15

D. The word "processing", as used in this exemption of persons engaged in the fishing industry, is a general term, embracing every process with reference to edible seafood, except the process of canning 20

E. Similarity or necessity of work in a field of production or activity does not require a conclusion of identity 36

CONCLUSION 43

CITATIONS.

Cases:

Addison v. Holly Hill Trust Products, 332 U. S. 607, 617, 64 S. Ct. 1215, 1221 32

Anderson v. Manhattan Lighterage Corp., 148 F. (2d) 971 ..... 9, 25, 35

Borden Company v. Borello, 325 U. S. 679 42

Cincinnati Soap Company v. United States, D. C., 22 F. Supp. 141, 143 42

Cochrane v. Deener, 94 U. S. 780-788, 24 L. Ed. 139 41

CITATIONS.

Page

Cases—(Continued):

Davis v. Goodman Lumber Company, 135 F. (2d) 52 31

Donnelly v. Mavar Shrimp & Oyster Co., 190 F. (2d) 409 ..... 5, 8, 20, 39

10 East 40th Street Bldg., Inc., v. Callus, 325 U. S. 578, 65 S. Ct. 1227, 1229 ..... 38, 42

Farmers' Reservoir and Irrigation Co. v. McComb, 337 U. S. 755, 759, 69 S. Ct. 1274, 1277 36

Henry v. Markesan State Bank, 8 Cir., 68 F. (2d) 554, 557 42

Kirschbaum v. Walling, 316 U. S. 523 42

Maneja v. Waialua Agricultural Company, 349 U. S. 254 14

McComb v. Consolidated Fisheries, 174 F. (2d) 74 . 30

Phillips Co. v. Walling, 65 S. Ct. 807, 324 U. S. 490 ..... 15, 33, 37

State v. Pacific American Fisheries, 73 Wash. 37 P. 452-54 42

Tobin v. Blue Channel Corp., 198 F. (2d) 245 .... 8, 9, 31

Waldman v. Swanfeldt, 9 Cir., 66 F. (2d) 294, 295 . 42

CITATIONS.

Page

Cases—(Continued):

Waller v. Humphreys, 133 Fed. (2d) 193 (C. A., 5) 30, 42

Walling v. W. D. Haden Company, 153 F. (2d) 1953 (Fifth Circuit) 37

Statutes:

Fair Labor Standards Act, 52 Stat. 1060:
Section 13 (a) (5) 6, 24

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BRIEF FOR THE RESPONDENT, MYRTLE GROVE PACKING COMPANY.

OPINIONS BELOW.

The statement of the petitioner as to the opinions is correct.

JURISDICTION.

The jurisdiction is properly stated.

QUESTION PRESENTED.

The question is incorrectly stated in that the petitioner assumes that the court found below that there was an integrated process, continuous and uninterrupted, of canning shrimp and oysters, whereas, as contended by the respondent and found by the court, the employees of the respondent were not engaged in a continuous and uninterrupted process of canning.

STATUTE INVOLVED.

This question is, as we believe, properly stated.

STATEMENT.

The statement of facts set out in the brief of the petitioner in the main states the true facts of the case, but as in all other statements made by the petitioner, it is tinged with his absolute belief in the error of fact in the decision of the court below.

However, in order to expedite the process of the law, we shall not attempt to restate the case, except to call to the court's attention the following:

Petitioner's statement incorrectly alleges that "After a shucker weighs the oysters he has shucked to determine his piece rate earning, they are dumped into a tub for washing, (R. 83, Fdg. 4), and are then floated into another room where they are inspected, placed in a brine tank, and reinspected. (R. 83, Fdg. 5). The oysters are then carried to the 'packing room * * *'." (Petitioner's Brief, p. 6).

The undisputed facts show that after the meat is taken by the shucker to be weighed to determine his piece rate pay, it is flumed directly into the "packing room" where the oyster meat is "inspected and washed and portions of shells and oysters that might not be top quality are removed. Then they are carried along to packing tables where they are put into cans." (R. 32).

Petitioner's statement also incorrectly alleges that "They (the raw picked shrimp) are then floated in flumes to an inspection belt, inspected and cooked in a blanching tank. (R. 84, Fdg. 11). After reinspecting and grading for size, they are carried to the 'packing room' where they are placed in cans, sealed and heat treated.(R. 84, Fdg. 13)". (Petitioner's Brief, p. 7).

The undisputed facts again show that "* * * the pickers pick the hulls, separate the hulls from the meat, and they keep the hulls in a bucket and the meat is flumed immediately into the packing room where it goes for canning there. (R. 35). After this, the shrimp meat is partially cooked, cooled and inspected, partial hulls removed from them, and carried to a grading machine which separates them for size. Then they are carried to the packing table and each can weighed and run on down to the canning machine line, and then put into a retort Bettle for a final cooking. (R. 36).

In R. 26 there was a stipulation entered into between the Department of Labor and the Myrtle Grove Packing Company, and in this stipulation in paragraph 2, the Department of Labor agreed to the following facts: "Defendant" (Myrtle Grove Packing Company) is engaged

in the purchase, handling, **processing,** canning, sale and distribution of shrimp and oysters." And in paragraph 3 of the same agreement, R. 26, it was further agreed as follows: "Substantially all of the shrimp and oysters handled (approximately 95%) were **processed** and canned." It would therefore appear that the Department of Labor itself agreed that there was a process separate from canning, for nowhere in the record is there mentioned any process involving these shrimp and oysters aside from the process of canning, except the original process carried on by the shuckers of oysters and pickers of shrimp in their work looking towards the processing of shrimp and oysters so that when separated from shells and hulls, both valuable by-products, the meat could be used in various ways as salable, edible seafood.

As shown by the record, the "handling" referred to consists of unloading the shrimp and oysters and conveying them to the point at which the first processing begins, which in the case of shrimp is the separating of the hulls from the meats and in the case of oysters is the washing and initial steaming to make the oysters more readily opened, and the actual opening of the oysters, and separating the meat from the shell. (R. 32, 35). (This Brief, Appendices 2 and 4).

"Canning" in the case of shrimp consists of the preparatory operations to the actually hermetically sealing of the can, such as the cleaning, inspecting, boiling, reinspecting and grading, placing in cans, seasoning of the meats in the cans together with the finally hermetically sealing of the cans, casing and labeling. (R. 49); (This Brief, Appendix 5).

Canning of oysters consists of washing, inspecting, weighing of the meats, placing in cans and seasoning together with the hermetically sealing of the cans, including sterilization by steaming, cooking, casing and labeling. (R. 49); (This Brief, Appendix 3).

It would further appear that the District Court, in his finding of fact, adopted this stipulation as a portion of his finding of fact. (R. 83).

Certainly the record further abundantly shows that there was no need for any continuity of operation, either with reference to shrimp or oysters, except for the purpose of saving the necessity of refrigerating the processed food, and when this was done, both the shrimp and oysters could be packed and were sometimes packed in canneries miles away. In other words, the rapidity of all of the efforts of the various persons having to do with shrimp and oysters was in order to prevent any injury to the health of users of this product.

SUMMARY OF ARGUMENT.

Congress added when amending in 1949 Sec. 13(a) 5 of Fair Labor Standards Act "(other than canning)" to processing. The Fifth Circuit Court of Appeals in *Donnelly v. Mavar Shrimp and Oyster Company*, 190 F. (2d) 409, decided against the Labor Department's contention that canning included the earlier processes of shucking of oysters and hulling or picking shrimp, finding that canning included only those steps necessary to canning. These acts are performed by a class having special skills and, as a class, their activities as laborers have the same impracticability of regulation as seamen.

The *Donnelly* case expressed the view of Congress in its holding that the Conference Report of Congress meant "necessary preparatory operations", performed on products before they are placed in bottles, cans, or other containers" to mean those things and operations as ordinarily understood to be canning and so defined.

The purpose of the Fair Labor Standards Act is to give able bodied men and women a reasonable pay for a fair day's work. The workers in this industry have progressed at a higher rate than those covered by the act. Their pay basis enables those who are not able bodied to assist in earning a living.

The *Donnelly* rule will allow a continued accomplishment of the purposes of Act. The *Blue Channel* rule will result in the replacement of many of these workers by machinery.

"Processing" as used in Sec. 13 (a) (5) of the Act includes all the steps in preparing seafood to be consumed. Canning limited "processing" only as canning is ordinarily understood and as it is defined. When shrimp are picked or oysters shucked, the seafood is transformed into a usable product. It can be further processed by curing, freezing or canning. It can be consumed in that state.

This exemption in favor of these workers is because they are a separate and distinct class of worker. They are free, independent, and work when and for whom they please. Their working procedures have grown over a period of years. If they are changed the employees will have to be replaced by machines.

Since canning does not necessarily include every step in the chain of causation it is not necessary or proper to read into the plain language of Congress a limitation that will destroy this class of worker and change the expressed Congressional intent.

ARGUMENT.

OYSTER SHUCKERS AND SHRIMP PICKERS, WHILE PERFORMING A PROCESS THAT EFFECTUALLY CHANGES NATURAL EDIBLE AND LIVE SHRIMP AND OYSTERS INTO A COMMODITY THAT COULD BE CANNED, WERE NOT NECESSARILY INVOLVED IN A PROCESS OF CANNING. THE WHOLE QUESTION IN THIS CASE REVOLVES AROUND THE MEANING OF THE WORDS USED BY THE CONGRESS IN ITS 1949 AMENDMENT TO THE FAIR LABOR STANDARDS ACT.

The Congress did not say in this Amendment that the exemption was removed from all persons where the seafood was canned, nor does the correct and exact meaning and punctuation of the language used even suggest this. On the contrary, if we give effect to the meaning of the language used, the words "(other than canning)" qualified "processing" only to the extent that "processing" was canning.

Now if canning were not a separate and distinct process, recognized by people of the most ordinary intelligence for the last one hundred years as something exact in its nature and separate and apart from other processes, then there would be more validity to the argument of the petitioners that this qualification of "processing" de-

stroyed all exemptions of those persons engaged in processing of edible, aquatic matter if the goods were afterward canned.

In support of the petitioner's position that reason and logic and law lies in the opinion in *Tobin v. Blue Channel Corp.*, 198 F. (2d) 245, rather than in the opinion rendered by Judge Holmes in *Donnelly v. Mavar Shrimp and Oyster Co.*, 190 Fed. (2d) 409, the petitioner set up the fact that the *Mavar* case was a declaratory judgment case. Certainly it is to be presumed by the court that the Circuit Court of Appeals of the Fifth Circuit would give the same consideration to a legal question presented in the complaint seeking a declaratory judgment as it would in any other type of litigated action. And therefore, the statement by the petitioners that the *Donnelly* case was a declaratory judgment action, is wholly beside the point. Furthermore, regardless of what Judge Rives said in the *Donnelly* case, the government was in fact a party to that litigation, having obtained permission to file and having filed a most exhaustive brief in opposition to the lower court's holding that shrimp pickers and oyster shuckers were covered by the exemption, the subject of this litigation. Furthermore, in no wise was the decision in the *Donnelly* case founded upon any agreement, but rather upon the record and the very logical reasoning of the court that in the very nature of things, a shrimp picker or an oyster shucker was not a canner of seafoods. This is utterly reasonable, because the record in this case and common knowledge of this most interesting occupation, shows that the very same people who prepare shrimp or oyster meats, that are afterwards canned, use their skill and labor for the preparation of the same articles when

there is no thought of their being canned. And furthermore, it appears by the evidence overwhelmingly both in this case and in the *Donnelly* case, that there is no need for the immediate canning of shrimp or oysters, that it does not have to be what the petitioners call an integrated process, but that the oyster and shrimp meat resulting from the shuckers and shrimp pickers work, can be and is often carried miles away before it is used in a cannery. (R. 43).; (This Brief, Appendix 1).

We admit that in *Tobin v. Blue Channel*, that the Fourth Circuit reached an opinion absolutely harmonious with the reasoning of the Secretary of Labor, but we deny that under the law it was compelled to follow this reasoning rather than the logical reasoning of a court of law, over a matter which it had jurisdiction. Furthermore, there was a difference in the type of person involved in the exemption claimed in the *Blue Channel* case, for there is no definite type of laborer known as a crab picker. Almost any person, in any locality where crabs are canned, may to a certain extent follow this occupation, and they do, for this is a new occupation, using new labor, whereas from the beginning of the shrimp and oyster industry in America, evolving from a certain class of people having special skills, came the subject matter of this lawsuit, shrimp pickers and oyster shuckers.

In *Anderson v. Manhattan Lighterage Corp.*, 148 Fed. (2d) 971, the barge captain performed at times nearly every act that is required to be performed by seamen, but the court said they were not seamen, even though they worked upon a vessel and performed duties, ordinarily required, at times, of members of the crew of a

vessel, and in arriving at this conclusion among other things, the court in holding that they were not seamen and therefore come under the provision of the Fair Labor Standards Act said "persuasive also is the further reason behind this exemption, namely, the impracticability of regulating the wages and hours of ordinary seamen in the manner contemplated by the Act". Here were people engaged on a seaworthy vessel used to transport commerce to the far corners of the earth, who were held not to be seamen and in deciding this fact, the court took the position that seamen, in a way, had to be exempted from the Act because of the impossibility of regulating the wages and hours of the seamen.

In the present case, the people involved, young and old, whole and handicapped, are shown to be separated from ordinary persons employed in a cannery by the manner of their work, the hours of their working, and the customs surrounding their work, all of which made impossible any reasonable compliance with the Act, were they to be brought under its protection.

A. NOTHING IN THE LANGUAGE OF THE 1949 AMENDMENT OR THE LEGISLATIVE REPORTS IS REPUGNANT TO THE OPINION IN THE *DONNELLY* CASE.

Certainly the historical facts alleged by the petitioner on Page 12 of his brief are correct. However, the inferences drawn from the fact are not correct, for a reading of the original exemption and the exemption as amended shows no thought on the part of the Congress of any intention to exclude any of the workers mentioned in

their broad exemption, except workers engaged in canning. Now as we have said before, the *Blue Channel* case is in direct support of the petitioner's argument, but it is not in accord with what would appear to be the expressed intention of the Congress in writing the amendment in Section 13(a) (5) into the list of exemptions from the provisions of the Fair Labor Standards Act. We feel here, that in as much as we are of the opinion that not only reason influenced the *Donnelly* decision, but also a sense of fair dealing and justice on the part of the court, that we have a right to reason with the court as to the meaning of the amendment mentioned above.

A close reading of Judge Holmes' opinion and the explanation of the amendment given by the Committee in Congress will show that there is absolutely no conflict between Judge Holmes' conception of the extent of the law and the intention of Congress as expressed in their report on the law.

At the time Congress was considering the law, it is a matter of common knowledge that vast quantities of fish, in fact the largest amount of fish caught in America, was processed, and a great portion of it was processed in the same canneries or factories or fishing wharves or whatever you may call them, where some part of the fish was canned for consumption by people who were not in a position to receive fresh or frozen fish.

Therefore, Congress had before it the knowledge that fish were handled in two ways, in one way by refrigeration and in the other way by hermetically sealing in cans, and when it provided that the word "canning" was

to include preparatory work it certainly had in mind the preparatory work immediately preceding the actual canning, which is done always in the case where goods are canned.

We see from the record in the case at bar and from the evidence of record in the *Donnelly* case, which is attached to this brief as appendices, 1 through 5, including the series of pictures attached thereto that four or five operations in the canning room were done in preparation for the actual canning.

In the case of shrimp, the shrimp were washed, inspected, blanched, sorted for size, placed on racks, dried, afterwards weighed, brine was added to their content, then the cans were sealed and later pasteurized.

All this was work done in preparation for canning and was the same sort of work that is always performed where goods are canned, and was in fact, according to the definition given the word, actual canning. These employees are paid in accordance with the Act.

The work of the shrimp pickers and oyster shuckers, while sometimes in assistance to the actual canning, was not a part of the canning, which was something separate and apart from the canning, including as it did, the use of artificial means to open the oysters, beheading and shelling the shrimp, inspecting the shrimp and taking the oyster from the shell, which process created not alone the aquatic food that could be canned, but did not have to be canned, but also other valuable by-products such as oyster shells and shrimp hulls used for fertilizer, cement, etc.

We, therefore, say that the court found in the *Donnelly* case that we were obeying the law in paying those persons engaged in canning and in the "necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers."

B. ANY REASONABLE CONSTRUCTION OF THE WORD "PROCESSING" AS USED IN THE EXEMPTION, SHOWS THAT SUCH PROCESSING WAS QUALIFIED ONLY BY THE ACTUAL ACT OF CANNING AS ORDINARILY UNDERSTOOD.

We disagree with the position of the petitioner that the court in the *Donnelly* case, while recognizing that "canning" included "every other operation necessarily performed on the products before they are placed in cans", would not give effect to its recognition of this fact.

In other words, the petitioner assumes that only such logic and reason as possessed by the petitioners or the courts agreeing with them is entitled to consideration. That is not true. Varying persons have varying conceptions of the effects of the same Act on the same state of facts and in the logic and reason used by the court in the *Donnelly* case, it was not only buttressed by justice and right, but also by every interpretation of the word "canning" that can be found in our laws or in books defining this word.

Canning certainly is an operation that was clearly defined before the Fair Labor Standards Act was ever thought of and for over one hundred years this definition has stood, and all that the court in the *Donnelly* case held was that this separate and distinct class of workers, that

is, shrimp pickers and oyster shuckers, were performing a process that, while connected with, was not necessarily a part of canning and often was done without any thought of canning. (R. 39, Appendix 1, P. 23, P. 26). Certainly, the court was exercising only a rule of reason in arriving at this conclusion from all the facts before it in the *Donnelly* case, which is set out in the Appendices to this brief.

In *Maneja v. Waialua Agricultural Company*, 349 U. S. 254, a case which is cited by the petitioner, the court found that trainmen and machinists, because of the circumstances of their work, would be classed as agricultural laborers. Now, certainly, the record in this case abundantly shows that shrimp pickers and oyster shuckers are a separate and distinct type of labor, necessary in the processing of seafood, but not absolutely necessary in canning. They were not engaged in canning, their business often had no connection with canning. In the *Donnelly* case the Court did not narrowly construe the law, but construed it intelligently so as to avoid the destruction of a peculiar and particular type of labor, who by their own efforts, and without the assistance of the Fair Labor Standards Act, since the passage of this act, have increased their pay nearly one thousand percent. See Appendix I, page 44. As we will point out later in our argument, this appeal is merely for the purpose of deciding whether the *Blue Channel* case, *supra*, or the *Donnelly case*, *supra*, is a reasonable statement of the law, and in its brief the petitioners can see nothing but logic and reason in the *Blue Channel* case. However, an examination of the authorities will show that this opinion is not supported by

relevant law and other controlling facts, as is the opinion in the *Donnelly* case.

C. THE *DONNELLY* CASE IN ITS CONSTRUCTION OF THE PARENTHETICAL WORD "CANNING" AS USED IN THE EXEMPTION DOES NOTHING TO AFFECT THE REMEDIAL PURPOSES OF THE FAIR LABOR STANDARDS ACT.

In *Phillips v. Walling*, and many other later decisions, this court has virtually declared that the purpose of the Fair Labor Standards Act was to give to able-bodied men and women a reasonable pay for a fair day's work and the court has in its construction of particular cases, varying from case to case, often said that the purpose of the law and of the court's construction, was to remedy the particular evil which existed.

Now how has the construction of the word "canning" by the Fifth Circuit affected the remedial coverage of the Fair Labor Standards Act?

For the purpose of understanding this, we believe that we have a right to consider the history of the Act and its purpose to destroy certain mischief inherent in low paid labor. It is apparent from the construction of the Fair Labor Standards Act in *Phillips Co. v. Walling*, 65 S. Ct. 807, 808, 324 U. S. 490, 493, that the purpose of the Act, was, and we quote "insuring to all able-bodied working men and women a fair day's pay for a fair day's work". Now the court's construction of the word "canning" in the *Donnelly* case in no wise affected this purpose. It appears from the record, that people working in the plants who were actually engaged in the canning process, were

paid at least the minimum wage and that the only persons not paid under the Act were those who were specifically excluded from the Act, including the shrimp pickers and oyster shuckers who were engaged in a process "(other than canning)".

Many of these shuckers and pickers are not able-bodied people (R. 13, Appendix 1, Pp. 43-44) but on the contrary are the unfortunates who stand on the fringe of the present little economic upheaval, where the government has found it necessary to protect the lower segments of the labor force. They are not only not able-bodied, but many of them can't do a day's work; in fact they work sporadically according to their will and ability. (R. 15, R. 77). But in doing this they have not only made a living for themselves, or assisted others in making a living for themselves, but during the whole life of the Fair Labor Standards Act have come into court only once, to urge the coverage of that act, and that is when they were brought into court in the *Donnelly* case. And in the record of that case, Appendix 1, P. 44, it is clearly shown that these people, whom the government affects to be protecting, have actually raised their wages during the life or period of the Fair Labor Standards Act nearly one thousand percent, whereas, all the law could do during the lifetime of the Fair Labor Standards Act was to raise the pay of common labor two hundred fifty percent. In other words, this is not a case where there is any mischief to be corrected, nobody is being injured, or has asked for any help from the Labor Department, but on the contrary, because the Labor Department, the petitioner here, wants to bring this separate class of workers into conformity with all other persons actually engaged in can-

ning, the petitioner has set about a deliberate course that will not advance the interests of these people but on the contrary, if successful, will replace them with machines. (R. 77). Therefore, the argument of the petitioner that the decision in the *Donnelly* case is wrong, rests on its opinion that courts must follow the administrator's idea of the meaning and construction of an act. In other words, the administrator says that the meaning of the words "(other than canning)" does not qualify "processing" when "processing" does not precede canning, and when the processing is succeeded by canning it extends the meaning of the word "canning" so that it would go back even to the fishermen who remove the oysters from the bottom of the sea, for sometimes this is done less than an hour before these oysters are shucked in the shucking shed of the packing plants, which also maintains a cannery.

The only reason why courts have held that exemptions should be strictly or narrowly construed, is because the basic law is thought good and only those persons should come within the exemptions that would not be benefited by the law or affected by the law. We do not think that the court must always construe the law narrowly, when it would mean an injustice, or would not work towards furthering the purposes of the law it is construing.

In this case, the lower court said that canning is canning, not processing, and refused to strike from the exemption, which is one of the broadest exemptions in the law, the word "processing". For instance, if there was a section of the law which exempted every class of worker in the meat packing industry other than canning, would it be

reasonable to construe the law to the effect that a man in killing a beef, skinning a beef or chemically making parts of the beef into drugs, would be engaging in the occupation of canning merely because this processing was qualified by the words "other than canning" and preceded the canning of such meats, as arose from these processes? We do not believe this could be true.

We call the court's attention here, that the fishing industry is not a canning industry. Sometimes it is accompanied with canning, but it has ramifications which extend far beyond the dreams even of Nicholas Appert, the man who discovered canning. And therefore, by the logical use of a word, "canning", processes which are as old as this industry are not immediately turned into canning. Certainly the court will not use this construction when such a construction is not necessary, where there is no mischief to be remedied, where the philosophical, economical and social purposes of the law in question were not required to protect these people and where such a construction will destroy. not aid or assist, the people. I hope that we are not guilty of any violation of the court's rules when we say here that sometimes "The letter of the law killeth, but its spirit giveth life."

In the *Donnelly* case, *supra*, the court, with all of the facts of this particular and interesting occupation before it, decided that it had a peculiar situation to adjudge, that it was dealing with living human beings, who would be affected by its judgment, that a construction of the law based upon the administrator's interpretation would not assist in carrying out the spirit of the Fair Labor Standards Act, but would only be in assistance of the

conformity demanded by the administrator, and with all this before it, it reasonably, intelligently, logically, and justly construed the Act so "not as to remedy any mischief, but rather to prevent a mischief," which would be a serious threat to the livelihood and existence of the group of women, old men and old women, who could not secure work elsewhere, R. 15, but who are making a living now in carrying out the work of their fathers and were doing it so successfully that without any government protection, in twenty years their pay had increased one thousand percent.

Moreover, the present method of payment on a piece rate basis is what all of the shuckers and pickers want.

Mrs. George Duvall, President of the Seafood Workers Association Union, when testifying in the *Donnelly* case said "And, may I say this, that our worker's don't want that. (To be covered under the Act). They want to earn what they can earn. We have a good many old workers in our plant, who have grown old in service. They can go in these plants, and they are permitted to go and come as they please. They can work three or four hours and go home, and they thank God every night of their life that they are permitted to earn that day. They are satisfied and don't expect to make as much as fast workers. Everybody is satisfied with what they can earn. (Appendix 1, p. 43).

Her testimony was fully substantiated by Mrs. Florence Powloski, Secretary-Treasurer of the same Union, who testified that the union bargains with the packing plant owners for their scale of wages and that "We would like to work like we did in the past, which has been the

method of our grandmothers and grandfathers." (Appendix 1, p. 46).

D. THE WORD "PROCESSING", AS USED IN THIS EXEMPTION OF PERSONS ENGAGED IN THE FISHING INDUSTRY, IS A GENERAL TERM, EMBRACING EVERY PROCESS WITH REFERENCE TO EDIBLE SEAFOOD, EXCEPT THE PROCESS OF CANNING.

Prior to October 26, 1949, the words "(other than canning)" used parenthetically to modify or limit the word "processing" were not in the act.

It is the position of the respondents, substantiated by the overwhelming evidence introduced and found to be fact by the court, that the canning of oysters in the seafood industry is but one of the processes necessary to prepare seafood for market; that shrimp taken from the sea are transformed to merchantable and salable goods, when, and only when, they have been subjected to several processes, the first and most important of which is picking. After this they may be sold and merchandised in the numerous forms set out in the opinion of Judge Holmes in *Donnelly, et al., v. Mavar Shrimp and Oyster Company, Ltd., et al.*, 190 F. (2d) 409, one of which is by canning. The use of these shrimp in the canning process does not by some magic change the nature of the previous picking process and convert it too, into the canning process.

It would appear from the facts in the *Donnelly* case, which were similar to the facts in this case, that every bit of the work of the laborers used in picking shrimp and

shucking oysters could be done, and often times is done, wholly without reference to canning; that this process is only one of the processes used in changing the seafood from a raw state to a finished product; and that it is always accompanied by the production of two separate and distinct commodities, on one hand, oyster meat and shrimp meat that could be used for canning or for other purposes, and on the other, oyster shells and shrimp hulls, both of which are very valuable as fertilizer and used for many other purposes. After this process is completed some of the shrimp and oysters are canned at other packing plants. In any event, there is a final product when the pickers and shuckers are finished with their work.

In the case of oysters, it is not only a separate and distinct process, but the evidence shows without question that the plant does not come into possession or ownership of the oyster until the process of opening has been completed. After these workers have finished and completed their work in opening these oysters, the oysters are subjected to inspection by the union, and if the price is unsatisfactory to the fishermen, they can then be sold to another factory. (R. 44; Appendix 1, pp. 24 and 40).

And we think the evidence in both the *Donnelly* case, and in the case at Bar, shows it is feasible to transport this meat and can it at another factory, and, therefore, when the work of these laborers is completed, it can be sold elsewhere, and is, at times, the subject of sale and barter between the factories, before being canned or otherwise used.

If anything, the whole record of the case at Bar, and the record on which the opinion of Judge Holmes in the *Donnelly* case was based, shows that the process of shucking oysters and hulling shrimp is a distinct and needed one in order to change the uncleaned and unopened shrimp and oysters into a raw product that afterwards, through different processes, can be canned, quick frozen, or sold cooked and peeled. (R. 22; Appendix 1, p. 25).

We bring to the Court's attention that processing, as used in the Statute is an inclusive word, which embraces all the acts necessary to transfer raw seafood into a commercial product, not limited to any one act or process. It consists of the many processes necessary to create edible seafood. Sec. 13(a) (5) excludes one of these processes, that is, canning, from the exemption; canning by general definition is one process.

The word "canning" has, heretofore, been construed by a number of the Circuit Courts of Appeal, including the second and the fifth. We here submit to the court that the opinion of Judge Holmes in the *Donnelly* case is eminently correct, and the lower court, in the case at Bar, was entirely justified in following this as a precedent, because, not only is this type of labor almost separate and apart from all other types of labor, but it is engaged wholly in a separate, separable, and distinct process.

Respondents have recognized coverage of the act for all employees engaged in canning as defined by the *Donnelly* case and the dictionaries and has paid its said employees accordingly.

We take the liberty of citing the definition of canning from recognized works on the meaning of words in common use in this country:

> Webster's New International Dictionary, Second Edition, Unabridged, p. 387, Can. v.t.; Canned; canning. 1. To put in a can or cans; to preserve by putting in sealed cans or jars.

> Funk and Wagnalls New Standard Dictionary. Canning—The act, process, or business of preserving, fruits, vegetables, or meats, by partial cooking, or other process, and hermetically sealing in tin cans, glass jars," etc.

> In older editions of Webster's Dictionary, the verb "can" is defined as signifying: "To preserve by putting in sealed cans. Canned goods, a general name for fruit, vegetables, meat, or fish, preserved in hermetically sealed cans."

Process is defined in Webster's New International Dictionary, Second Edition, Unabridged, p. 1972, as:

> "To subject to some special process or treatment. Specif.: a. To heat, as fruit with steam under pressure, so as to cook or sterilize. b. To subject (esp. raw material) to a process of manufacture, development, preparation for the market, etc.; to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking;—in past part. often distinguished from raw. * * *"

In this and other definitions of "processing" we find nothing that is discordant between the two definitions because while processing is a general term, it is also used as applying to some special act.

For instance, in any place in the South, it would be perfectly feasible to operate a cotton gin in connection with an oil reduction plant, but certainly, there would be nothing in common between the process of taking lint from the cotton seed and afterwards, even though it can be done by a direct run from the cotton gin, of pressing the oil from these seeds, thereby turning the seed into oil, and different forms of fertilizer or food. Yet, we cannot imagine that a law which would exempt every act in the procedure and processing of cotton "other than ginning" that would mean everyone engaged in working in the oil reduction process, would be considered as engaged in ginning, simply because one of the processes of the production of a raw material from the field consisted of removing the lint from the seed. By the same reasoning the workers, the subject of this lawsuit, engaged in the picking and opening of shrimp and oysters where the meats of which may afterwards be sent to a separate room or establishment, where every act that is envisioned in the definition of canning takes place, that is, the shrimp and oysters are cleaned, graded, seasoned, inspected, put in cans, cooked and labeled, are not engaged in canning so as to exclude them from the exemption of Sec. 13(a) (5) of the Fair Labor Standards Act.

We are familiar with the fact that it is the duty of the courts to give consideration to the regulations of the Administrator of the Fair Labor Standards Act and to

the Congressional Committee Reports. We are further familiar with the necessity on our part of establishing to the satisfaction of the court that the Congress intended definitely to include the exemption of any general class of workers, but when Congress by the use of words having a common acceptation and meaning creates an exemption general to a whole industry as broad and as far reaching as the exemption being litigated before the court, it becomes the duty of the court to give a reasonable construction to these words used by the Congress.

The reason why this exemption granted under Section 13(a) (5) of the Act is so broad and comprehensive is that there is a vital difference in working conditions between persons engaged in the seafood industry and persons otherwise engaged in industry in our country. For, except in great factories where canning is almost an automatic process from beginning to end, it is impossible to tie down people engaged in the fishing industry to any regular hours of work, and this is a basic reason why the exemption was allowed.

In the case of *Anderson v. Manhattan Lighterage Corp.*, 148 Fed. (2d) 971, the Court struck down the exemption demanded or requested, by persons who were commonly called captains of the lighters. The court however, did make the following pronouncement: "Persuasive also is the further reason behind this exemption, namely, the impracticability of regulating the wages and hours of ordinary seamen in the manner contemplated by the Act . . .".

It is one of our contentions in the case at Bar that it would be wholly impossible to regulate the hours of work and the wages of the laborers who are really the subject of this lawsuit.

In order to understand this, the court must look into the background of these people, as well as the history of the shrimp and oyster industry.

This is not a great industry. We doubt if the entire income in the United States resulting from all types of the shrimp and oyster industry, exclusive of the oysters in Long Island Sound and in New Jersey, would be worth over $30,000,000.00 a year.

Beginning in about 1870, after the oyster beds of Maryland and Virginia were exhausted, there sprung up in the bays, bayous and marsh lands of Mississippi and Louisiana, an industry centered around the canning of oysters.

Certainly, many years before this time oysters were canned in Maryland and Virginia under the name of cove oysters, and about this time a man in Louisiana, named Dunbar, found it possible to can shrimp and these two fish products were developed and came into existence together. The laborers necessary in the whole operation from catching the shrimp and oysters to completing the work of their preservation, came from a sturdy clan of French, Spanish and English fishermen who earned their living from this work.

The younger men found their vocation in fishing for the shrimp and oysters, in carrying out the arduous

labor of operating the vessels, tonging for oysters, following the shrimp schools and bringing their catch into port, sometimes an hour's distance, sometimes two or three day's distance.

And after it was unloaded at the dockside, the second of three types of necessary labor took over and we find that while the older sons of the fishermen assisted in operating the vessels, their wives, mothers, their elderly fathers, and other old relatives commenced the work of preparing the catch for commerce and use.

This work is in a way skillful, just like it takes skill of a kind to hoe cotton or to cut down a tree, but it requires very little education and very little strength and it can be perfectly easy for persons who from their infancy had a knowledge of these products of the sea.

After the oysters were cleaned and inspected, these people continued the process by steaming them to force them open and then from the open oyster shell, the meat was taken. The heads and hulls of shrimp were removed, and later the shrimp meats taken into a room where it was required that the workers have some knowledge of the preservation of food and where it is necessary to turn out a safe, edible product.

In the canning room the oysters and shrimp have to be inspected for dirt, or any foreign matter, which must be removed from the meat. The shrimp meats are cooked in a brine solution; an exact amount of oyster and shrimp placed in cans and the proper amount of brine having the exact amount of salt has to be added to the cans, the cans

have to be weighed and properly hermetically sealed, and when this is done, the meat in the cans has to be further expertly sterilized by steam pressure. After this the cans are cooled, cleaned, labeled, packed in boxes and stored for shipping.

This second process, that of canning, requires careful, skilled attention. It is different in that the first process did not require a technically skilled type of worker. Therefore, over a long period of years the older men, the older women, the housewife, and the elder children who were supplementing the family income, became a separate and distinct type of worker, one engaged in the processing of shrimp and oysters, but not engaged in canning.

It would, therefore, appear that considering the whole of the fishing industry in America, that the persons engaged in picking shrimp and shucking oysters constituted a separate, distinct class. In fact, they are so *sui generis*, you find no one like them in America, or as far as the writer of this brief is concerned, any where else in the world.

They constitute a class that came up because of the need of this local industry and because of their natural love of freedom and willingness to labor that is found among fishing classes of all countries. The evidence in the case at Bar Shows that these people do not work for particular processing plants but move from one processing plant to another and are free to come and go as they please. Some work two, four or eight hours. Housewives work early in the morning, go about their home duties or social obligations, and come back to work. Old men labor for the

number of hours that their meager strength will allow, and the young people, where the law permits, work before and after school hours. (R. 77, Appendix 1, p. 43).

Now, certainly, all of these conditions can change. Shrimp can now be hulled or picked by machinery and it is foreseeable that the same work can be done by machinery in the oyster industry. (R. 77). A class of persons who cannot conform, and would not conform to the Wage and Hour Law would be destroyed; that is, the livelihood of these old, aged, maimed people who now subsidize their grants by the government to the extent that they at least have a decent living and not the meager one that comes from social security or an old age pension, will be lost.

We are aware of the fact that the federal government, under the commerce clause of the Constitution, can direct by industrial legislation the activities of people engaged in interstate commerce, and marshall virtually the whole of the working class of Americans as some other countries, under a different form of government, do by decrees. It is the duty of the courts to so interpret laws as to aid and assist the Congress in carrying out the purpose and intent of those laws, especially when the Congress by the use of common, ordinary understandable English has provided some relief for a named class of persons. However, it is the duty of the courts to look into all of the facts and the effect of the enforcement of the law, to give effect to any helpful provisions in a law releasing certain classes from its coverage and not to ignore the basic philosophic reason for an exemption, and not to follow the whims and desires of a department to compel a man

who works in an exempted class to conform to the regulations governing a non-exempted class.

It has been the plainly expressed purpose of the Labor Department ever since the Fair Labor Standards Act was enacted, to so interpret the exemptions, as to bring under the coverage of the law, every possible person, whether exempted or not exempted. For instance, in the case at Bar, the government is claiming that because the results of the efforts of the seafood workers engaged in opening oysters and hulling shrimp was to produce a product that, by long and intricate processing, became canned food, that thereby this separate, distinct type of worker, having characteristics of no other type of worker in the fishing business or otherwise in the whole of the United States, and having customs and manner of labor not found elsewhere in other businesses, being as they are free to work any number of hours, at any time, on any day, for any processor in the community, having absolute allegiance to no one, but the right to labor for all as it suits their convenience, became a canner of food, and yet, at the same time, time after time, we see the same department taking a different stand. For instance, in the case of *McComb v. Consolidated Fisheries*, 174 F. (2d) 74 and *Waller v. Humphrys*, 133 Fed. (2d) 193 (C. A., 5), the Labor Department was strongly urging that a watchman, although engaged in some of the work of processing food and persons performing necessary duties for other processes of food were not engaged in processing. Now, in this case, they want to say that everyone who works under the roof of a processing plant, where canning is sometimes carried on, is engaged in canning, although there is no more resemblance between an oyster shucker

or a shrimp picker, and the people engaged in the actual canning of these products, than there is between a longshoreman working on a dock and a clean, intelligent office manager who daily computes the extent of their efforts.

And furthermore, we notice this inclination much more strongly in the case of *Davis v. Goodman Lumber Company*, 135 F. (2d) 52, where the business with a total gross of about $350,000.00 a year was engaged almost totally in the local retailing of lumber and its products. However, in doing this, in order to meet some of the needs of its customers, it made certain parts used in manufacturing establishments and only a small amount of these parts were shipped in interstate commerce, yet the Labor Department contended, as to the workers and the foreman who made these parts, although made in the same building with the use of some of the same material, operated by the same firm, was a distinct class of worker engaged in work other than service establishment or a local business selling in intrastate commerce. In other words, the government, in that case contended that two or three men out of hundreds could be lifted from the local exempted employment and brought within the fold of persons coming under the provisions of the Fair Labor Standards Act.

Furthermore, in the recent case of *Tobin v. Blue Channel Corp.*, 198 F. (2d) 245, the government made the same contention and attempted in the above case to enlarge the construction of the meaning of the word "canning" so as to bring a person engaged in other activities leading to canning, within the protection of the Act. We therefore say to the court that there is no consistency in the attitude of the Department of Labor. The Adminis-

trator of the Fair Labor Act does not make the law; he administrates the law. Congress makes it and the courts construe it. While in their constructions the courts will give some consideration to the Administrator's construction of the law, yet it is still bound by the plain obvious meaning of the words used in the law, which gave vitality to the exemption as well as life to the Act.

In *Addison v. Holly Hill Trust Products*, 332 U. S. 607, 617, 64 S. Ct. 1215, 1221, this honorable court in construing a similar exemption under Sec. 13(a) (5) of the Fair Labor Standards Act said: "We should, of course, be faithful to the meaning of a statute, but after all Congress expresses it's meaning by words. . . ." "The natural meaning of words cannot be displaced by reference to difficulties in administration."

It is not the duty of the administrator of this law to disagree with the Congress in his construction, or to attempt to broaden the base of the law so as to become a greater watchman over the working man that he was created by the Act. Yet it is obvious from the whole history of litigation involved in the Fair Labor Standards Act that this is the express purpose of the Labor Department. Certainly, provided we do it in a gentlemanly manner, we have a right in our argument to criticize the activities of the gentlemen who are enforcing this law. We have a right, not only to protect ourselves in our economy so as to prevent our businesses from being destroyed, but also in doing this to consider that which is best for the weak, halt, maimed and blind, who can find in their work the last remaining hope for their useful, worldly existence. These employees can work according

to their custom, free and untrammeled, in the manner of their forefathers, and can combat the economic dangers of this life in their old age with the same stubborn courage that marked their adventure into the hardships and dangers of fishing in their youth. They are human beings, and this litigation is directed against them, not against the respondent, because it may be possible for the economy of the shrimp and oyster business in the South to stand being changed into a wholly automatic or machine operation, but under no applicable rule of wage, hours or manner of work, can these poor people qualify under the regulations of the Administrator of the Fair Labor Standards Act.

All the way through this litigation in its briefs and in its arguments before the court, the petitioner has been urging that the courts adopt the rule announced in *Phillips Co. v. Walling*, 324 U. S. 490, and "narrowly" construe the exemptions granted. The Labor Department's construction of this word "narrow" would be synonymous with crush or destroy the exemption granted. They would have the exclusion "(other than canning)" grow to such proportions that it would gobble up the exception "processing" it purportedly limited. In other words, the construction of the decision cited above, and certainly the court meant no such construction, was that the court should be used to destroy a right, privilege or license granted by the Congress. Certainly, the word "narrowly" construed does not mean that it becomes so narrow that the exemption is destroyed. For a river a mile wide can be narrow in comparison with a Gulf or Bay, and a Gulf or Bay can be narrow in comparison with an ocean, or a road of

1920 can be narrow when compared with the same road made in 1950.

Now, all the court meant, as we believe, was that the court would not broaden the scope of the right given where created by Congressional exemption. It did not mean that it would not give full effect to the plain meaning of the English words used by the Congress in writing the law. In order to uphold its argument for narrow construction, the appellant quotes the following part of the Conference Report. We quote: "Canning" includes "necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers".

The language used in this part of the report is almost identically the language used by Judge Holmes in the *Donnelly* case, and his logical reasoning that this did not include the separate process or operation of reducing the raw products of the sea to separate parts, one of which could be used for the purpose of canning, is irrefutable. For instance, and we quote this case, "Canning includes * * * every other operation performed necessarily on the products before they are placed in bottles, cans or other containers." Now does not the record show that these preparatory operations for canning are washing, grading, cooking, inspecting, weighing, seasoning and so forth, before they are placed in bottles, cans or other containers? Certainly it does. And these operations are entirely separate and distinct from the operation of the initial process of steaming and shucking the oysters and peeling the shrimp. Everybody on the ship is engaged in a common purpose, that is carrying the vessel and its cargo

or passengers safely from one port to another port, yet if you were to construe the individual efforts of the workers of the vessel, you would find nothing in common between the labor of the man who worked as a stoker and the labor of a man who cooked the food that fed and nourished the others engaged in this nautical operation.

For instance, in *Anderson v. Manhattan Lighterage*, 148 Fed. (2d) 971, Judge Clark had under consideration the claim that captains of non-self-propelled barges were seamen. It would appear from the evidence that the men worked on the barges, they stored cargo on the barges, they trimmed this cargo, they regulated the amount of cargo, and they made trips from place to place on the barges, BUT THEY DID NOT PERFORM THE ORDINARY DUTIES OF SEAMEN, and even though they were traveling on the sea at times in charge of a vessel that used the waters of the seas and bays, this did not turn them into seamen. Certainly in that case, the Labor Department was urging that the men were not seamen, even though they performed many, many more duties in the nature of the duties of a man of the sea than the oyster shuckers and shrimp pickers performed in the nature of the duties of a canner of food. And in the very nature of the work of these people, they are not engaged at any time exclusively in the canning of food. Their work was preparatory to the use of the raw product in many other forms, such as freezing, cooking or canning and their engaging in this preparatory work, which has set them apart as a class for over seventy-five years, separate and distinct from people engaged in canning operations, does not change the nature of their employment and make them engaged in a process of canning.

When the law was considered by the Congress and passed, it was understood that shrimp and oysters and other seafoods are subject to varying and many processes and this exemption was qualified only by the words "other than canning". In other words, every separate and distinct process which subjected aquatic life to being turned into useful food was exempted (other than canning). Now, what does it mean by "other than canning"? It means that separate and distinct process of canning, which has a historic meaning and simple meaning as shown by all the books devoted to the construction of words and as commercially considered by persons engaged in the food industry.

E. SIMILARITY OR NECESSITY OF WORK IN A FIELD OF PRODUCTION OR ACTIVITY DOES NOT REQUIRE A CONCLUSION OF IDENTITY.

In *Farmers' Reservoir and Irrigation Co. v. McComb*, 337 U. S. 755, 759, 69 S. Ct. 1274, 1277, where this honorable Court was discussing the agricultural exemption claimed by an irrigation company in Colorado, and certainly in that dry country irrigation projects are the backbone of agriculture which could not exist without that type of water supply, it was decided that the company's function was necessary to agricultural production, but still was not identical with it and was not agriculture. Here, shucking, hulling or picking are necessary to canning, but are not identical with it. Such activity is truly a process of its own just as canning is a process. In this case, the fact that each is a process does not create an equality or an identity. Each has a separate identity and a separate function.

It would also appear that in a number of cases of which *Walling v. W. D. Haden Company*, 153 Fed. (2d) 1953, (Fifth Circuit) a number of the Circuit Courts of Appeal, as well as other appellate courts, have decided that irrespective of the fact that men labor on vessels resting upon the surface of the sea, kept watch, held various duties on these vessels, that if these duties did not conform to the generally known duties of seamen, they would not be considered seamen under the provisions of the Fair Labor Standards Act.

In other words, the Act shows that one would not be judged by any work he engages in, but on the contrary, would be judged by the type of work he engages in, and in arriving at this decision, of necessity, the Courts had reason to examine the dictionaries and other books of reference to construe the meaning of the word "seamen", and then to this word they gave an utterly strict construction in order to carry out, as each court expressed itself, "the will of Congress", which was to the effect "the Fair Labor Standards Act was designed to extend the frontiers of social progress by assuring to all able-bodied men and women, a fair day's pay for a fair day's work". *Phillips Co. v. Walling*, 324 U. S. 490, 493, 65 Ct. Repts. 807, 808.

In the *Haden* case, *supra*, the court reasoned as follows: "the words of the exemption are 'employees *employed as seamen*'. The italicized words mean something. They are not mere tautology."

Now we are of the very reasonable opinion that Congress acted within its constitutional power in granting the broad exemption which exempted our employees

from the purpose of the Act, and their association with other work did not determine whether or not persons engaged in a particular occupation were exempted, but the determining factor would be the particular nature of the work itself.

This was illustrated most strongly in the case of *10 East 40th Street Bldg., Inc., v. Callus, et al.*, 325 U. S. 578, 65 S. Ct. 1227, 1229, in which all of the employees of a building housing concerns actively engaged in Interstate Commerce to about forty-five percent of its capacity, requested that they be included among the persons protected by the provision of the Fair Labor Standards Act. This right was denied them and in the opinion of Mr. Justice Frankfurter, we find the following: "The series of cases in which we have had to decide when employees are engaged in an occupation necessary to the production of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act."

Therefore, we come again to the consideration of the words "processing (other than canning)". In doing this we have to agree with Judge Holmes in the *Donnelly* case, *supra*, for the reason that the logical expression in his opinion is founded upon not only the meaning of the words,

but on a rule of common sense, for as Judge Holmes says, "if picking shrimp and shucking oysters are not exempted, what are the processes other than canning that were in the legislative mind? Catching, cultivating, curing, storing, freezing and marketing, are without qualification specifically exempted from the wages and hours law. What, then, we repeat, are the processes (other than canning) that the amendment intended to exclude from the exemptions if the actual canning retroactively embraced everything previously done to the product except catching, curing, storing, freezing, and marketing?"

In other words, to our simple minds, Congress intended in the plain language that was in the first statute, as well as the amended statute, to exempt processing of aquatic foods.

Now what is this process that is to be exempted if the only process preceding canning, is to be included in canning?

Certainly, this would destroy the intention of a Congressional exemption and while we are willing to admit that the courts have gone very far in construing this act to include every laborer that could be effected thereby, yet this liberality will not include the oyster and shrimp pickers in this case who are not engaged in canning. It will take a rewriting of the law which under the provisions of the Constitution, rests solely upon the Congress.

Furthermore, in the opinion of *Donnelly, et al., v. Mavar Shrimp and Oyster Company, et al.*, above referred to, Judge Holmes included in his opinion the following:

> "A corn shucker is not a miller, and a shrimp picker is not engaged in canning shrimp any more than a corn shucker is engaged in canning corn. The least that can be said is that the processes are separable; and that the Act so contemplated is indicated by retaining the exemption as to processes other than canning."

It would be a far-fetched theory for one to advocate that a person who does the shucking of an ear of corn, even if done in the same building where afterwards the corn is canned, is engaged in canning if all the other processes with reference to corn were exempted, and certainly it would appear that it was the intent of Congress that all of the processes other than canning were to be exempted. This is clearly shown by the fact that Congress met four times since the *Donnelly* case was decided without amending this part of the Fair Labor Standards Act although each time it had the opportunity to amend the Act if it so desired. Congressional committees are always investigating the coverage of this far-reaching Act because it is the subject of political controversy at all times.

Now as to the liberal construction to be given by the Courts to the Fair Labor Standards Act, we must say that many times these statements have been lifted out of text so as not to express the real purpose and meaning of the Court in using this expression, but on the contrary, to attempt to bring into existence a fixed rule of law, like the law of the Medes and Persians that couldn't be changed, as if to admonish the court to exclude from any exemption

and to place under the coverage of the law, any laborer engaged in Interstate Commerce.

Most assuredly this is not true for it is the duty of the court to give expression, if possible, to every part of an Act of Congress and to give to each word used in such enactment the ordinary, usual meaning of this word as construed by those persons having knowledge of the meaning of the English language.

We again quote from the opinion of Judge Holmes in the *Donnelly* case:

> "The position and punctuation of clause (5) in paragraph (a) of Sec. 213, Title 29, indicate that the parenthetical words (other than canning) modify only the preceding word 'processing' and not the words 'marketing, freezing, curing, storing, or distributing.' Curing means to prepare for preservation or permanent keeping; to preserve as to cure beef or fish. See Webster's Dictionary. We must give full effect to all the words used by the Congress; to do this means that preparing shrimp or oysters for preservation or permanent keeping is exempted from the provisions of both Sections 206 and 207 of Title 29. These appellants are not engaged in canning; they do not work in the canning room; their work is frequently done without any intention on the part of their employer to can the articles that are being processed; they are engaged in a process involving shrimp and oysters that is distinct from, not necessarily related to, canning. Cochrane v. Deener, 94 U. S. 780-788,

24 L. Ed. 139; Waldman v. Swanfeldt, 9 Cir., 66 F. (2d) 294, 295; Henry v. Markesan State Bank, 8 Cir., 68 F. (2d) 554, 557; Waller v. Humphrys, et ux., 5 Cir., 174 F. (2d) 74; Cincinnati Soap Company v. United States, D. C., 22 F. Supp. 141, 143; State v. Pacific American Fisheries, 73 Wash. 37, P. 452-54."

Certainly, this court in the *10 East 40th Street Bldg., v. Callus, et al.*, quoted above, has held that the court is not bound to any hard and fast rule in determining by exact measurement the class of people who come within the meaning of the Fair Labor Standards Act.

In *Kirschbaum v. Walling*, 316 U. S. 523, and in *Borden Co. v. Borello*, 325 U. S. 679, involving persons engaged in the operation of a building used in Interstate Commerce, this Court held the exact opposite of its findings in the *10 East 40th Street Bldg.*, case, *supra.* The reason for these findings were that the facts were different in these various cases, and therefore the court construed the law in the light of the facts before it and would not narrowly construe the meaning of a well known word.

It stands without contradiction, that the Congress intended to exempt every single employee in the seafood industry up to and including the time when goods were ready for shipment except persons engaged in canning. These persons who pick shrimp and shuck oysters are engaged in processing, (other than canning), even though this process may precede the process of canning. This process of picking and shucking is separate, distinct and insofar as the law is concerned, not related to any other

process. Certainly the employees of the respondents, who are the subject matter of this lawsuit, are not engaged in canning, but engaged in an occupation that is one of its kind in the United States, and which they carry on absolutely without reference to canning. They open oysters and pick shrimp for a multitude of purposes, working in the same building under the same rules, carrying on the same customs, working one day for one man and another day for another man, and yet Plaintiff contends that suddenly, if this work precedes the canning of the goods, because of its proximity to the process of canning, it takes on the nature of canning. We cannot so conclude.

CONCLUSION.

We, therefore, respectfully submit to the court that the opinion of the eminent Judge of the court below and the judgment in the *Donnelly* case, and the judgment of the Fifth Circuit in the case at Bar, should be affirmed.

Respectfully submitted,

W. L. GUICE,
Attorney for Myrtle Grove Packing Company, Respondent.

CHALIN O. PEREZ,
JACOB D. GUICE,
Of Counsel.

APPENDIX 1

Testimony in Donnelly v. Mavar Shrimp & Oyster Co., 190 Federal (2d) 409.

(21)

Mr. Nick Mavar, a witness called on behalf of the Plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. W. L. Guice, Counsel for Plaintiffs:

Q. Your name is Nick Mavar?

A. Yes, Sir.

Q. How old are you, Mr. Mavar?

(22)

A. I am 36.

Q. You are a native of Biloxi, Mississippi?

A. Yes, Sir.

Q. You are employed by the plaintiff, Mavar Shrimp and Oyster Company, Inc.?

A. Yes, Sir.

Q. How long have you been with them?

A. Fifteen years.

Q. Fifteen years. I think you attended the University of Mississippi, intending to be a lawyer, is that right?

A. Well, briefly, yes.

Q. Then you decided to go into this business with your people?

A. Yes.

Q. Now, prior to the time you entered into the actual work in the shrimp and oyster business, were you because of the occupation of your father and mother, familiar with, acquainted with the shrimp and oyster business in Biloxi?

A. Yes.

Q. Were you acquainted with the original plant here, the one called Dunbar-Dukate Company?

A. Yes, Sir.

Q. And acquainted, likewise, to the operation of the Biloxi Canning and Packing Company?

A. Yes, Sir.

Q. Julian and other operating parties in Louisiana and Mississippi?

A. Yes, Sir.

Q. Now, before the Court today, Mr. Mavar, is whether or not the shucking of oysters, that is, the operation beginning at the pier and ending at the pay-off window, if that is a necessary part of the canning of oysters. Do you know anything about that—I mean, are you acquainted with that?

(23)

A. Yes, sir, that is a part of the canning.

Q. Are you acquainted with it?

A. Oh, yes, sir.

Q. Are you acquainted with these two operations as carried on by the Mavar Shrimp and Oyster Company and Williams Packing and Navigation Company at Biloxi?

A. Yes.

Q. Now, is the operation as conducted by these two factories practically the same now as the operation conducted by the ordinarily average shrimp and oyster processing and canning plant in Louisiana and Mississippi?

A. Yes, sir, that's right.

Q. Now I will ask you if, from your knowledge of this business, gained over your fifteen years experience in it, is the essential processes shown in File No. 1 here entitled pictures 1 to 9, showing the process of steaming and removing the oyster meat from the shell, is that operation separate and distinct from the packing of oyster meat in cans?

Defendants objected for the reason the question called for a conclusion of the witness.

Objection overruled.

A. Yes.

Q. State whether or not in carrying on the business of canning plants if it is perfectly feasible and workable to process this oyster meat, we will say at Lakeshore, Louisiana, and canning it at Biloxi?

A. Sure.

Q. Has that been done?

A. Yes.

(24)

Q. It is done by the original and largest oyster factory, Dunbar-Dukate?

A. Yes.

Q. State whether or not in the past, or under adverse and other circumstances which made it most feasible, if Mr. Taultavaul, who was with the Biloxi Canning Factory, opened oysters in Louisiana and canned them in Biloxi?

A. Yes, sir.

Q. Mr. Mavar, when the boat, which catches these oysters on the reefs of Mississippi or Louisiana, ties up at the wharf of your plant or the Williams Packing and Navigation Company plant, to whom do the oysters in the hold of that boat belong?

A. The fishermen.

Q. The fishermen who caught them?

A. Yes.

Q. Then, by the process shown in File No. 1, they are carried up on the pier, washed, placed in cars, steamed and cooked, opened by the Laborers who are defendants in this case, and then brought to a window to be weighed so that the laborers, who are defendants in this case, and persons similarly employed, may secure their pay. When they are brought to that window, who do they belong to?

A. The fishermen.

Q. In other words, the title to those oysters—

Defendants objected to counsel leading the witness.

Q. Well, I will ask you this: State whether or not, if the title of those oysters ever passes to the canning company until they are sold at that window?

A. That's where we buy them.

(25)

Q. Now, when you buy them there, state whether or not it would be perfectly feasible, with an average cooling temperature, to carry them anywhere along the gulf coast you desire to can them?

A. Sure.

Q. Is it a fact that in many instances in the past that one canner of oysters, in his canning plant, would can oysters for another person in the oyster business, that were processed originally in his shucking shed?

A. That has been done.

Q. Now we get to the question of shrimp. Most of the factories here handle both shrimp and oysters?

A. Yes.

Q. The laborers who are named defendants in the proceedings before the Court are engaged both in the shucking of oysters and in the cleaning of shrimp?

A. Yes.

Q. Now, will you tell the Court in what different ways shrimp are processed after they come in from the boat?

A. Well, they can be canned, they can be cooked and peeled and packed in cans hermetically sealed, frozen raw as peeled meat, they can be headless, they can be processed what we call fan tails, which are packed for ready frying.

Q. Now, when the boat, that is commonly called a trawl boat, goes into the sound, gulf and inlands, catch these shrimp, do you know whether the catch they bring back is going to be canned or cooked and sold in containers?

A. No, sir.

Q. Or frozen and sold in containers?

A. No, sir.

Q. When the shrimp come to the wharf do you know?

(26)

A. We don't know until we get down in the morning.

Q. After the shrimp are completely hulled, as shown by the last picture in File No. 3, which I hand you here, can they still be used for more purposes than being canned?

A. Sure.

Q. And they are so used?

A. Yes, Sir.

Q. Now, so that the Court may be informed on the subject of the type of your labor, will you tell the Court how you pay, that is, on what basis the labor who works in the processing

plant carrying out the first process of cooking and opening oysters and of washing and cleaning shrimp?

A. Piece work.

Q. What is that.

A. Piece work.

Q. How much do you pay per ship load for securing the oyster meat from the shells after the oysters have been steamed?

A. 18 cents a pound.

Q. Now, in the plant, do you know about what would be the average hourly wage prevailing among the various people who work there?

A. You mean average all the way through?

Q. About what percentage would make less than 75¢ per hour?

A. Pretty close to half.

Q. Then above 75¢ per hour, how high does the range go?

A. Some go as high as $2.00.

Q. But over half of them are below 75¢?

A. Yes.

(27)

Q. Would it be economy, would it be possible at this time to equalize those wages so that the high one would be willing to get down on a basis with the lower one?

A. I don't think it would be possible.

Q. If you had to raise the lower one to the higher scale, to 75¢ an hour, would it be possible for you to continue?

A. Couldn't stay in business.

Q. As stated in the bill of complaint that the prices paid to the union for opening oysters and cleaning shrimp during the past sixteen or seventeen years, has risen about one thousand percent. Is that correct?

A. It has risen quite a bit, but I don't imagine it has gone that high.

Q. Now, Mr. Mavar, in conclusion, you know what canning is?

A. Yes, sir.

Q. You have been all over the country?

A. Yes.

Q. You have been in all kinds of canning plants?

A. Yes, sir.

Q. And you are experienced in cans hermetically sealed?

A. Yes.

Q. At various, in different plants?

A. Yes, sir.

Q. And under different conditions?

A. Yes.

Q. Is there any direct or necessary relation between the first process here of cooking and packing the meat of oysters and the canning of them?

A. No, sir.

Q. Would that apply likewise to shrimp?
A. Yes, sir.

(28)

Cross-Examination

By Mr. Bidwell Adam, Counsel for Defendants:

Q. Mr. Mavar, what office do you hold in connection with the Mavar Shrimp and Oyster Company; are you an officer of the corporation?
A. No, sir, I am an employee.

Q. In what capacity do you represent the Mavar Shrimp and Oyster Company at their plant at Biloxi; do you have a title?
A. Well, no, not specifically. I am a second lieutenant, or superintendent.

Q. You act as superintendent of the plant?
A. Yes, sir.

Q. Your organization has a kind of fleet of boats; that's correct, isn't it?
A. Yes.

Q. How many boats do you have, use to go in the waters of the Mississippi Sound, Gulf of Mexico, to secure shrimp and oysters?
A. About thirty-five.

Q. Do you buy any oysters from any other boats other than your own fleet?
A. Occasionally we do.

Q. You have what is known as a freighter; that is what is known as a lager?
A. Oh, yes, we buy from all.

Q. You buy from who you can; is that right?
A. Yes.

Q. On the open market?
A. Yes.

Q. I want to ask whether the prices of oysters and shrimp are fixed by a union?
A. Yes.

Q. You have a Gulf Coast Fish and Shrimpers and Oystermen Union?

(29)

A. Yes.

Q. And you pay so much a barrel and so much for certain grades and classes?
A. So much a barrel for shrimp and oysters we buy by the pound.

Q. Do you buy any of these oysters before they are brought into Biloxi to your plant?
A. From the fishermen?

Q. Yes.
A. No.

Q. You don't buy them until they are brought to the plant?
A. No.

Q. They are unloaded on cars and then they bring them into the plant. Is that right?
A. Yes, sir.

Q. What I want to know is when does the oysterman lose his title, or sell his interest in the

oysters, and when do you all buy. At what stage in the proceedings—these pictures offered by your lawyers, pictures numbers one to nine from Exhibit No. 1 of the plaintiff that are in this yellow envelope marked Exhibit No. 1, and nine pictures numbered one to nine?

A. Yes, sir.

Q. And one I hold in my hand, number 9, which has this notation—"Oyster shucker having shucked meats weighed up in order to arrive at the amount earned."

A. Yes, sir.

Q. The oyster shucker shucked oysters from the shell and brought them to the window?

A. Yes.

Q. Who did these oysters belong to?

A. The fishermen that caught them.

(30)

Q. They are brought into your factory?

A. Yes.

Q. And when they get out of the shells they get in a large can the shucker is holding in front of the scales and being weighed?

A. Yes.

Q. After they are weighed you all buy them?

A. Yes.

Q. You pay them how much a pound after they are taken from the shell?

A. They run 40 and 45 cents a pound.

Q. Who do you pay for these?
A. The fishermen that catch them.

Q. That the captain of the boat?
A. Yes.

Q. That captain operates a boat in most cases for your organization?
A. That's right.

Q. And he operates with other men besides himself. How many other men?
A. Three to five.

Q. Each man receives a share—assuming they make $100.00 for oysters and there are four men and the boat, that would mean five shares, would it not?
A. Yes.

Q. Each would get $20.00 out of that?
A. Yes.

Q. At that stage, when you buy these oysters and you pay the captains of the boats and pay so much a pound for oysters, he in turn goes back and distributes this money to the members of his boat?
A. Yes.

Q. And he also pays your organization a share for the boat?
A. Yes.

(31)

Q. These women that have to shuck these oysters, they are paid by whom, Mr. Mavar; at that time, this woman in picture No. 9, she gets how much a pound for shucking?

A. 18¢ a pound.

Q. Who pays her?

A. The company.

Q. Do you pay her before you buy them, or after?

A. At the same time.

Q. At the same time, did this woman shucker have any arrangement with the captain of the boat about shucking of them; does he have anything to say about that?

A. Yes.

Q. Does that woman have a representative in your office all the time?

A. They are right at the scale.

Q. The defendants you named in this case, starting with Josephine Donnelley, all these ladies belong to a union also?

A. Yes, sir.

Q. Do they have their representative all the time in the factory to see they are taken care of, their interest is taken care of?

A. Yes.

Q. You don't pay for any of the oysters until after they get at that window, come through that window and are weighed up?

A. No.

Q. And each boat load is brought to the factory, shucked, and goes through the processes of cleaning, preparing them for shucking, and after they are shucked then they are paid for and not before?

A. That's right.

Q. And you have that arrangement in working with the union?

(32)

A. That's right.

Q. In the old days, or prior to this arrangement, the factories bought at so much a barrel taken off the boats, loaded them in cars, but through the factory and union organization, both men and women, they got away from that, it being the scheme and desire to have them bring a better grade oyster into the plant?

A. Yes.

Q. And they get larger prices for oysters. Is that right?

A. Yes.

Q. Mr. Mavar, with reference to the manner in which the shrimp are handled. I want to refer to the exhibit, please sir, referred to as Exhibit No. 4, marked File No. 4, which has pictures one to 10 inclusive, I am now addressing myself to Plaintiff's Exhibit No. 4; picture No. 1 shows the proceedings of the shrimp in the early stages; is that right?

A. Yes.

Q. And No. 2 shows where they are being received and placed on tank for cooking?

A. Yes.

Q. No. 3 shows the shrimp being transported on cooling and inspection belt?

A. Yes.

Q. And No. 4 is the same shrimp as shown on picture No. 3, being cooled and graded for size?

A. Yes.

Q. And picture No. 5 shows graded shrimp being staked for use later on the picking table. Is that correct?

A. Yes, sir.

Q. And picture No. 6 shows the same shrimp as picture No. 5 being placed in cans preparatory to being sealed?

A. Yes.

(33)

Q. No. 7 shows the same shrimp after the cans are filled with water traveling down picking line to be sealed, and shows the canning machine which hermetically seals the cans?

A. Yes.

Q. Picture No. 8 shows the canned shrimp being placed in baskets preparatory to sterilization?

A. Yes.

Q. No. 9 shows basket being dropped in kettle or drum for the purpose of being sterilized for 13 minutes at 250 degrees Fahrenheit?

A. Yes.

Q. And No. 10 shows the sealed and sterilized shrimp prepared for shipment?

A. Yes.

Q. What I wanted to ask you, Mr. Mavar, the same arrangement with reference to oysters; is also true with reference to shrimp, so far as operation of the fleet of boats is concerned, where they go out in the Gulf waters to catch shrimp?

A. They go out to catch shrimp.

Q. And they work on shares the same as they do with oysters?

A. Yes.

Q. And you have three or four large boats you refer to as freighters?

A. Yes.

Q. These men working on the small boats catch shrimp and bring them to the freighter. Is that right?

A. Right.

Q. And unload on the freighter to be weighed?

A. Yes.

Q. What do they get to show that they own the shrimp?

A. Get a receipt from the captain of the freight boat.

(34)

Q. Does he also catch shrimp?

A. Yes.

Q. When the small boats brings shrimp to the freighter that later brings them to the factory, what process with reference to unloading, handling and selling takes place; how is it done, I want to know that; is the shrimp unloaded on the docks, at the boat?

A. Yes.

Q. Into what?

A. Into a tank on the end of the pier. The ice is removed.

Q. Is that assortment or shipment, group or batch of shrimp brought in by a boat named by a freighter named John M, and the John M. brings a batch of shrimp, are those shrimps set aside separate from all other shrimp?

A. They are all mixed up.

Q. But say the captain off the . . . has a receipt that he owns 500 pounds of shrimp?

A. That's right, they have a receipt for their shrimp.

Q. As set out in pictures one to ten in Exhibit No. 4, when is it you buy the shrimp, when is it that they become your property?

A. We buy them when we unload them at the factory.

Q. Then your arrangement to buy shrimp is a little different than that to buy oysters?

A. Yes.

Q. Then when they are picked they belong to you?

A. Yes.

Q. They belong to you when you unload them at the pier; is that right?

A. Yes.

(35)

Q. Getting down to the actual work of these people, the time it takes to shuck oysters and pick shrimp. These shrimp pickers that have to pick shrimp, they pick them in your factory after they go through the process of boiling and cooking?

A. They pick them before.

Q. Don't you have some shrimp picked after they are cooked?

A. They are picked out and graded.

Q. You take the hulls off of them before they are ever cooked?

A. Yes.

Q. That is true of all shrimp in your factory, and of other factories operating on the same basis?

A. Yes.

Q. After the shrimp are picked by these employees, in the picking department, Mr. Mavar, they are classified and placed in three or four different classifications, and you sometimes cook the shrimp and seal them as soon as they are cooked?

A. Yes.

Q. The other shrimp are frozen after they are cooked?

A. Yes.

Q. Those frozen are not put in little cans and sealed?

A. No.

Q. Most anybody comes in to you and gets them and carry them off to retail trade?

A. Right.

Q. Where they are canned and sold as in these pictures, they are put in cans, hermetically sealed, and later put in containers of either 24 or 48 cans to the container?

A. Yes.

(36)

Q. Of different sizes and weights?

A. Yes.

Q. And you then ship them off to different markets throughout the country?

A. Yes.

Q. Is it your contention that these people picking shrimp, the defendants here, that they don't participate in any type of work classifying them as engaged in the canning business?

A. That is right.

Q. They don't have anything to do with canning?

A. No.

Q. At the time they pick them, or at the time they pick anything, do you or anyone else know what is going to be done with that at that time?

A. No.

Q. You might get an order for a 1000 pounds of shrimp and sell them?
A. Right.

Q. Those shrimp are in cans?
A. No.

Q. What about the shrimp that are in cans?
A. What do you mean?

Q. Do they have anything to do with the canning of those shrimp?
A. No.

Q. How much time from the time the shrimp are picked; how do you pay them off, how often; do they get paid off every day?
A. We pay them for the hulls.

Q. Whatever system you use. Assuming they have 20 pounds of hulls, they get paid how much per pound?
A. 4¢ per pound.

Q. Those 20 pounds of hulls are weighed and they get their 80¢ right then?

(37)

A. Yes.

Q. And if she wants to go home she can go home. Is that right?
A. Yes.

Q. Are any hours set when a picker must start or when she must stop by you all?
A. Not as far as we are concerned.

Q. It is all done on a basis of so much a pound for the amount that picker picks. Is that right?

A. Right.

Q. With reference to when pickers are through and retire, leave the plant, are those shrimp canned that same day?

A. Yes.

Q. Some may be canned and some may be frozen and some shipped away right then?

A. Yes.

Q. But the pickers, you contend, have nothing to do with the process of canning?

A. No.

Q. It is not your contention that those who come in under the canning process are not entitled to come under the wage and hour law?

A. Repeat that, please.

Q. Under the benefits of the wage and hour law?

By Mr. Guice:

I will say this: That we don't contend that people employed in the cannery are exempt by provisions of law. They are covered.

By the Court:

For the record, gentlemen. As I understand it, from the oral statement, you have other witnesses who would testify to substantially the same thing as this witness.

(38)

By Mr. Guice:

That is right, but it would be substantially the same testimony.

By the Court:

I can't see no necessity in putting the other witnesses on.

The Plaintiffs rested.

MRS. GEORGE DUVALL, a witness called on behalf of the Defendants, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. State your name, please.
A. Mrs. George Duvall.

Q. You are Mrs. George Duvall?
A. That's right.

Q. You live in Biloxi?
A. That's right.

Q. Your business at this time is what, Mrs. Duvall?
A. President of the Seafood Workers Association.

Q. Your home office, principal place of business is located in Biloxi, Mississippi?
A. That's right.

Q. How long have you been president of this organization, Mrs. Duvall?
A. Fifteen years.

Q. You know all the defendants in this case?
A. Yes.

Q. They are members of your organization?
A. Yes.

(39)

Q. And you know them personally?
A. That's right.

Q. I want to ask you if you, with several members of the defendants in this case came to see me?
A. That's right.

Q. I want to ask you if, in your work as president of your organization, you are in contact with members of the union?
A. Every day.

Q. You heard the testimony given by Mr. Nick Mavar, put on as a witness by the plaintiffs; you were in the Court room when he testified?
A. Yes.

Q. You heard all his testimony?
A. That's right.

Q. Now, with reference to the manner in which the oysters are brought into factories, in any factory, did he correctly state that?
A. Right.

Q. The manner in which the oysters are shucked by the shuckers. You heard his testimony, did he correctly detail just exactly like the factory operates?

A. He correctly detailed it.

Q. I want to know from you, in your work you go into all these factories?

A. Every day.

Q. You observe your workers, your members of your organization?

A. That's right.

Q. You have a chance to discuss with them your problems?

A. That is true.

Q. And examine conditions as to health, sanitation, whether they are clean, properly maintained. That part of your job to see the members of your organization have clean wholesome places in which to work?

(40)

A. Yes.

Q. So you have a chance to see the conditions under which they work?

A. I don't have anything to do with what the conditions are, but all our plants are modern.

Q. If you found they were not sanitary you would take that up?

A. I would speak about it and it would be corrected.

Q. When these oysters are shucked and brought to the window and weighed—you saw the picture No. 9 in this case where a woman brought oysters and dumped them on the scales to be weighed—it was testified that the oysters, up until that time, belonged to the fishermen. Is that correct?

A. That is a fact.

Q. After they are weighed then the boatmen are paid for whatever amount they bring to the factory. Is that correct?

A. Correct.

Q. You heard me ask Mr. Mavar about if there were four members of a crew and the boat getting one share. Is that correct?

A. That is right.

Q. You haven't done anything but be president of this organization for fifteen years?

A. Right.

Q. That's all you have done?

A. Right.

Q. And you are thoroughly familiar with reference to conditions of all factories?

A. I am.

Q. Do you know that some of the shrimp, when they are brought in, some of them are cooked and sold at the factory after they have been picked and cooked, and you know that some are

(41)

frozen and some are canned?

A. Yes. May I make a statement?

Q. Yes.

A. When those shrimp come in off the boats and put on the table for those pickers to pick, I have some members—I am quite sure I am telling the truth—if you asked one of the members if they were going to be picked and processed they don't know. For instance, they are large shrimp, if there are large shrimp among them they pick the heads off and throw them in a trough of running water, but if they are medium shrimp the heads are picked off and are thrown into a drum. Nobody knows that. I was a picker before I was president of the union and I saw thousands and thousands of pounds of cooked meat pulled out and put in one gallon cans that was not processed product. Therefore, you don't actually know whether it is going to be processed or not.

Q. To clarify your statement. When they are put in cans you don't mean put in large cans and sealed and processed?

A. No.

Q. The size of the can would be how large; did you say a gallon?

A. A gallon can and put it in cold storage.

Q. They were just put in a gallon can for convenience?

A. Yes. They have orders for that kind of shrimp.

Q. Then when they get orders the trucks would back up and take them away. Is that right?

A. Right.

Q. But they were not processed?

A. No. You don't actually know what is going to happen until you get to that table. All our members are paid in the back by the hour.

(42)

Q. Could any lady engaged in the picking of shrimp, could they or have they any way of knowing that the shrimp they pick would be frozen packed, or put in gallon cans?

A. No. They don't have any way of knowing that. Like I say, nobody knows that until they are put on the packers table.

Q. When the pickers get through with the work she performs as a shrimp picker they leave, don't have anything to do with canning or processing?

A. Not a thing.

Q. They work in a separate department?

A. That's right. The piece-worker work is in a separate department. They have no reason to go into the packing rooms where goods is being put up at all.

Q. On this wage involved in this case, can you tell us what the average pay of a person engaged in picking shrimp or shucking oysters is?

A. We have some of our workers who are very very slow; they don't average much. Then we have some who will average 75¢ and a little better. Then we have some who average $2.00 or $2.25 an hour.

Q. That depends on the ability of the picker or the shucker to turn out a great deal more than others?

A. That is right.

Q. In other words, some can put out more work than others?

A. You have some folks who never get any faster, just pick at the same speed. We have some that make fast workers and make good money out of it.

Q. You have some that are not very fast, did you say, some that will come and work a day and won't make half as much as a fast worker?

A. That's true.

Q. If all were put on a basis of 75¢ an hour would the business of the factory be so that everybody could go on a profitable basis?

(43)

A. I don't think so. The people who work fast wouldn't be willing to work alongside folks so slow. You would have dissatisfaction and that wouldn't work.

Q. Have you discussed this matter with your members?

A. Repeatedly. The fast workers are going to slow down if they are not going to get any more than the other people that didn't earn it is getting. They are not going to work and let them get it and they not.

Q. Let me ask you this. The average shrimp picker and oyster shucker, as we are referring to, would make the one woman picking shrimp that makes 75¢ an hour—about how many pounds of shrimp do they have to pick to make 75¢ an hour, pay—4¢ a pound; if they pick 20 pounds of shrimp they would make 80¢ an hour?

A. Right.

Q. If you paid them all the same, 75¢ an hour, many of them would only pick about 10 pounds an hour?

A. Right.

Q. Then you would be paid 75¢ an hour for only 40¢ an hour?

A. That's right. And, may I say this, that our workers don't want that. They want to earn what they can earn. We have a good many old workers in our plant, who have grown old in service. They can go in these plants, and they are permitted to go and come as they please. They can work three or four hours and go on home, and they thank God every night of their life that they were permitted to earn that day. They are satisfied and don't expect to make as much as the fast workers. Everybody is satisfied with what they can earn.

(44)

Q. These older people, when they pick shrimp and shuck oysters, are they earning 75¢ an hour on the basis of 4¢ a pound?

A. Some of them may, but very few.

Q. And there are some that could?

A. That's right.

Q. Those that you know who cannot do that, would they be interested in trying to make the factory pay of 75¢ an hour?

A. Frankly, under the law, and they know that is what the law is, they would expect it, if it came under the provision of the wage and hour act. Our members contend they don't come under that law because that is all piece work.

Q. State if you could successfully operate a factory and pay 75¢ an hour instead of piece work?

A. I am not familiar with that, but I don't see how they could.

Cross-Examination.

By Mr. W. L. Guice, Counsel for Plaintiffs:

Q. About how long has the Union been in existence, what you call the shrimpers union?

A. Miss Kolosky could answer that.

Q. About twenty-five years, during the time you have served and others who have served with you, the earning powers have been advanced around a thousand percent?

A. Yes.

(45)

MRS. FLORENCE POWLOSKI, a witness called on behalf of the Defendants, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. Please state your name.
A. Florence Powloski.

Q. You live in Biloxi, Mississippi?
A. Yes.

Q. How long have you lived here?
A. Forty years.

Q. I want to ask you, Mrs. Powloski, if you are connected with any organization in Biloxi?
A. The Seafood Workers Association.

Q. And the Gulf Seafood Workers Association?
A. Yes.

Q. That is a branch of the ladies association?
A. Sister organization.

Q. How long have you been a member of that organization?
A. Since its organization I have been a board of director and for the past twelve years I have been secretary and treasurer.

Q. You have been a Vice President before that time, and now you are secretary and treasurer; is that right?
A. Yes.

Q. Your duties are the same as any secretary of that type?
A. Yes.

Q. You were in the Court room and heard Mrs. Duvall, heard her testimony?

A. Yes.

(46)

Q. You heard her testimony from start to finish?
A. Yes.

Q. Has she correctly stated the conditions under which members of your union work?
A. She has.

Q. Has she accurately given details as to the workers work and the manner of work and employment of your union in the factory?
A. Yes.

Q. Do you have occasion to go into the factories?
A. Yes, I do.

Q. Did you ever work in the factory?
A. Yes.

Q. You have worked in a factory?
A. Yes. Before I was secretary and treasurer I was a board of director and I was a floor walker. At that time Mr. Taultavaul operated the plant.

Q. The union and the factory work in harmony very well?
A. Never had any argument.

Q. I want to ask if there is anything that you know about this lawsuit with reference to the wages of employees, piece working employees. You care to state in any manner, of the desires in this case; have you got any information you care to give the Judge?

A. We would like to work like we did in the past, which has been the method of our grandmothers and grandfathers. In piece work you earn what you can, a scale of work set by the association and then brought to a meeting with the packers. We would like to work like we did in the past.

Q. May I ask you, do you have meetings of your organization and fix the price you receive, so much a pound for oysters and so much a pound for shrimp?

A. We do. We have special meets called, advertise

(47)

for three days. It is brought before the members and brought before the body of packers.

Q. Would you say that what Mrs. Duvall testified to in her entire testimony is substantially what you would testify to if I would ask you what I asked her?

A. I would, if you asked me the same thing you asked her. Yes.

Cross-Examination.

By Mr. W. L. Guice, Counsel for Plaintiffs:

Q. In the pictures, which you have examined and which are before the Court as Plaintiffs Exhibits No. 1 to No. 4, and marked Files No. 1 to No. 4, showing separate processes of oysters and shrimp, and separate canning,

there appears to be among the workers quite a number of Negro or colored people?

A. Right.

Q. They are members of your union?

A. Yes.

Q. They receive the same fair treatment and wages as any other members of your union?

A. Right.

Q. They are, however, is it not a fact, ordinarily slower in their movements?

A. Yes.

Q. And more of them earn less than 75¢ an hour?

A. Yes.

(48)

MRS. ROUMANIA A. FORD, one of the defendants, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. Will you give us your name, please ma'am?

A. Roumania A. Ford.

Q. Where do you live?

A. Biloxi, Mississippi.

Q. You are one of the defendants in this case?

A. Yes.

Q. I want to ask you, Mrs. Ford, if you heard the president of your organization, Mrs. Duvall, and the secretary and treasurer of it, Mrs. Powloski, testify?

A. I did.

Q. Did you listen to every question I asked them and their answer?

A. I did.

Q. Did they correctly, truthfully, testify the facts?

A. They certainly did.

Q. Would you make any change in your testimony if I put you on the stand and asked you the same questions that I asked them?

A. I couldn't.

MRS. JOSEPHINE DONNELLEY, one of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. You are Mrs. Josephine Donnelley?

A. I am.

Q. And you live in Biloxi, Mississippi?

A. Yes.

(49)

Q. Mrs. Donnelley, you are one of the defendants in this case?

A. Yes.

Q. You heard the questions that I asked Mrs. Duvall and Mrs. Powloski?

A. Right.

Q. Now, I want to ask if they have covered accurately and correctly the conditions where you work?

A. Yes.

Q. And the way people are paid for their work?
A. Right.

Q. Would you make any changes in their testimony if you were asked the same questions?
A. No.

Q. Do you have anything else you want to say?
A. No.

MRS. THERESA CLARK, one of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for the defendants:

Q. You are Mrs. Theresa Clark?
A. Yes.

Q. And you live in Biloxi?
A. Yes.

Q. Mrs. Clark, you are one of the defendants in this case, are you not?
A. Yes.

Q. You have heard the testimony here today?
A. Yes.

Q. You heard the president, Mrs. Duvall, and secretary and treasurer, Mrs. Powloski, of your organization testify?

(50)

A. Yes.

Q. You heard all the questions I asked them?

A. Yes.

Q. And you heard their answers?
A. Yes.

Q. Now, I want to ask you if your president and secretary and treasurer correctly and truthfully answered the questions with reference to working conditions?
A. Yes.

Q. The conditions, the basis under which they are paid?
A. Yes.

Q. Would you answer them, would your answer to the questions asked them be the same as theirs?
A. Yes.

MRS. OLIVIA HAMMOND, one of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Bidwell Adam, Counsel for Defendants:

Q. Please state your name?
A. Olivia Hammond.

Q. Mrs. Hammond, you are one of the defendants in this case?
A. Yes.

Q. I want to ask if you heard the president and the secretary of your organization testify here today?
A. Yes.

Q. You have been in the Court room all the time?

A. Yes.

Q. You heard all the questions asked them?

(51)

A. Yes.

Q. And you heard all their answers?

A. Yes.

Q. I want to ask you if they have correctly and honestly detailed your working conditions?

A. They did, yes, sir.

Q. The members of your organization work in the factories at Biloxi?

A. Yes.

Q. You are familiar with the work?

A. I am.

Q. You have been working there for a long number of years?

A. For thirty-five years.

Q. Then you are familiar with all of it?

A. Yes.

Q. I want to ask if I put you on the stand and asked you all the questions that I asked your president, Mrs. Duvall, and your secretary and treasurer, Mrs. Powloski, would you answer them the same as they did?

A. The same as they did, yes.

Q. You wouldn't change it any?

A. No, sir.

The Defendants Rested.

By the Court:

Let me ask you, Mr. Adam, as I understand it these defendants are really demanding the minimum wage if they are covered by it?

By Mr. Adam, Counsel for Defendants:

Yes, we claim they come in under the wage and hour law.

(52)

By the Court:

As I understand it, Mr. Adam, while there is much conflict in this testimony, you are demanding, insisting your clients are entitled to the minimum wage?

By Mr. Adam:

Yes. Under the law.

By the Court:

I find now, as a matter of law, the Court has jurisdiction, and that it is a detestable controversy between these parties, and as matter of fact there is a rather close question of law involved and one upon which I want thorough argument, and I am going to let you submit it by brief because there is no dispute upon the facts of the case. A lot of testimony has been introduced which is immaterial, for instance, the opinion of the litigants, some of them that it would be better for the factory and the union to be permitted to continue under the old scale, under the old system. That is entirely immaterial, for if they are covered by this act the Court will so hold. The only reason

I am requiring a brief is where your facts as detailed by witnesses on both sides and substantially admitted that these defendants are covered by the Act of Congress now to be construed. If they are covered by it then, of course, the bill would be dismissed and the declaration of law would be made that they are covered by it. Of course, if they are not covered by it then the Court would declare they are not covered by it, and the Court would issue injunction to prevent them proceeding by injunction. Bringing it down to a closer and more narrow point of law, the question for determination by the Court is whether the work is a part of the canning process of the business of these

(53)

plaintiffs. If it is a part of the canning process, within the meaning of the act, then they are covered. If it is not a part of the canning process, under the act, then the act would not be as to them. That is all I can determine at this time. I should like to have instructive briefs. I will give the Plaintiffs fifteen days in which to file their brief, and give the Defendants fifteen days in which to reply thereto.

JUDGE'S FINDING OF FACT AND CONCLUSIONS OF LAW.

(Filed July 3, 1950)

(Title Omitted)

The Court finds the following facts in the above styled cause.

1. That the Plaintiffs are non residents of the State of Mississippi, being corporations organized under

and with their chief domicile in the State of Louisiana, but engaged in the operation of shrimp and oyster boats, shrimp and oyster packing plants, and shrimp and oyster canning plants in the City of Biloxi, Harrison County, Mississippi; and the Defendants, and all persons similarly situated, are residents of the State of Mississippi, being domiciled within the Southern Division of the Southern District of Mississippi.

2. That the amount in controversy exceeds the sum of $3,000, exclusive of interest and costs, and there exists at the present time, as shown by the admissions

(54)

in the answer, the evidence produced in the Court, and the admissions made in open Court, demands upon the part of the Defendants against the Plaintiffs which will exceed in the case of each Plaintiff the sum of $3,000; and that there further exists a justiciable controversy between the parties of which this Court has cognizance because of the amount involved, together with the fact that the suit is between residents of different states, and arises under a law of the United States of America.

3. It appears further from the evidence, both documentary and oral, admissions made in the pleadings and in open Court, that the City of Biloxi has, in the past been, and is now one of the chief centers of the shrimp and oyster industry in the United States of America, and that there is located in said city numerous oyster and shrimp processing plants and factories, some of which are engaged in processing shrimp and oysters raw for the purpose of being sold other than in hermetically sealed cans, as well as in some instances processing them for the pur-

pose later of canning the same within the meaning of canning as hereinafter construed by the Court.

It appears and I so find that each of the Plaintiffs own separate plants at Biloxi, Mississippi, and that their operation, including the taking and harvesting of shrimp, being shell fish and crustacea, including the going to and returning from the oyster beds and shrimp grounds, including the employment by the Plaintiffs of the Defendants in the loading, unloading, packing or processing of oysters and shrimp, and that during the period complained of in the complaint, that is on and prior to the first day of March, 1950, and for years theretofore, the Defendants were casual

(55)

workers of the Plaintiffs and were engaged in one of the operations of processes by which shrimp and oysters are processed so that they might theerafter be in a condition under which the same could be shipped raw, cooked or canned.

The evidence further shows, and I so find, that the acts leading up to the actual process of canning are as follows:

A. In the case of shrimp,—trawlers, that is motorboats driven by internal combustion engines, and having a net tonnage of from one to twenty tons, which vessels are equipped with a seine, commonly called a trawl, which by means of boards called otterboards, weights, and floats, would extend in the rear of said vessel for approximately sixty feet in width, and eight or ten feet in depth, and being propelled by the power of said vessel, would engage in the bag of said trawl or seine, edible shrimp which are cap-

tured by means of the seine or trawl being moved upward to the rear deck of the vessel through the operation of a power winch, and after being placed in the hold of said vessel, together with sufficient ice to preserve the same, until by the power of the vessel itself, or upon being loaded onto another vessel, the said shrimp are brought to the wharf of the company's plant in Biloxi, these shrimp being involved with crushed ice, would be shoveled onto a conveyor that would elevate the same for about ten or twelve feet, from which the said shrimp, together with the ice content, would be discharged into a tin trough filled with water, and by force of the water and gravity, the shrimp proceeds along this trough for a certain distance until they are dumped into a tank, which performs

(56)

two functions: first, washes the shrimp, and second, separates the shrimp from the ice and then the separated shrimp by means of a second trough where for a certain number of feet, the same by force of gravity, are conveyed past an inspector, who inspects and removes all shrimp considered unfit for commercial use, until finally the shrimp are discharged into baskets, which baskets are then carried to tables and the shrimp placed upon the tables, on each side of which are located the Defendants and persons similarly situated, who then engage in the process of either removing the heads of the shrimp, or of removing the heads and peeling off the skin of the shrimp. When the heads are removed from the shrimp but not peeled, the shrimp are then placed in a waterbourne conveyor which carries them into another room, where they are weighed and placed in five pound containers and prepared for quick freezing and shipment in interstate commerce.

In other cases, depending upon the size and quality of the shrimp, the shrimp are placed in a different trough and carried into a different room, in which room they are graded, either for the purpose of being placed in friction top cans and preserved with ice, or are moved into a further process which includes salting, weighing, capping, canning, hermetically sealing, pasteurizing, labelling and boxing the shrimp for shipment in interstate commerce, the use to which the shrimp are put being dependent upon their size, grade and quality, and when the shrimp are first taken from the boat and carried to the processing room where they are peeled or beheaded, neither the pickers nor the plant at that time know whether or not the shrimp are going to be used for canning or for sale in some other form. If the shrimp are used in some other form, such as being packed in boxes and quick frozen, or are placed

in large containers with friction top seal where protected by ice ,they are shipped to different parts of the country in intertsate commerce.

It would appear from the evidence and the admissions that the original process is separate and distinct and has no immediate relationship to the after use of the shrimp, that is whether they are used for canning, freezing or cooked and peeled.

B. In the case of oysters, boats of the same type as engaged in catching shrimp, are sent to the oyster grounds of Louisiana and Mississippi and there by means of dredges suspended from each side of the boat, enclose or capture oysters which are brought to the deck of the vessel, placed in the hold of the vessel, and by means of the

vessel itself, transported to Biloxi, where at the wharf of the company by means of power hoists, the oysters in containers are raised above the level of the wharf, and there are placed into a funnel-like contrivance which discharges the same into a revolving drum, into which water is constantly pouring, resulting in the washing from the oysters a great part of the dirt accumulated on the bottom of the sea, and preparing the oysters for the next step; and from this washing machine automatically the oysters are placed in cars approximately eight feet long and three feet wide which cars are pushed along a small track into a large iron box, capable of accomodating three or four cars of oysters and commonly called a steam box, where the oysters are subjected to about ten pounds of steam and about 250° Farenheit, which results: first in completely opening their shells and second, in cooking the meat of the oysters so that it is then and there edible and

(58)

useful for human consumption, and after being removed from the shell can and sometimes is carried many miles to a point of canning often in a different state. From this steam box, the cars are pushed along tracks into a shucking shed, where the defendants and similarly situated persons, by means of small knives, called oyster knives, remove the meat from the oysters, place it in cans, and when five pounds of meat is obtained, take these to a window leading into a cannery of the plant, and there the meat is weighed, and the shuckers, that is the Defendants and persons similarly situated, are paid at the rate of approximately 18¢ per pound for the shucked meat.

4. It further appears, and I so find, that both in the operation of the shrimp boats and the oyster boats,

some of which are owned by the Plaintiffs and others owned by private individuals, the boats are operated by a captain and crew, under a partnership, or joint adventure arrangement, with the Plaintiffs' companies, by which the captain and crew have absolute control of their destination, their hours and manner of work, and to whom they sell the catch, provided, however, that the catch is always sold to the Plaintiffs if they have a boat present or are willing to pay the market price, but if the market price is not paid, or for any other justifiable reason, the captain may sell the catch to a third person.

When the shrimp are brought to the company, the company pays the captain and crew for the shrimp; but, in the case of oysters, the catch is paid for by the number of pounds of oyster meat yielded by the catch and, therefore, the title to the oyster meat does not pass to the company until the first process performed

(59)

by the Defendants is completed, and at any time during this process, if the captain and crew are unsatisfied with the yield or the price, the oysters can be sent to another plant for working. If the oysters are bought by the company, and become the property of the company, that is the Plaintiffs in this case, they are then either sold to some other company for canning or if they are to be canned by the same company, are dumped into a trough which carries them through a washing machine and saline bath, by means of which all foreign matter is deposited at the bottom of the bath, and the oysters float into a receptacle from which they are taken and placed upon tables, and from these tables cans are filled by persons other than

workers of the class who are made Defendants in this case. The cans are then weighed, filled with salt water, placed upon a belt, and carried to a capping machine. The cans are then hermetically sealed, then placed in large round baskets and deposited in a processing kettle, where they are further pasteurized by means of steam for 14 minutes at 230° Farenheit. Later these cans are cooled by water, labels are placed thereon, and the cans placed in boxes and then stored or shipped in interstate commerce.

I find from the evidence and admissions that the Defendants and persons similarly situated, are engaged in a process involving shrimp and oysters which is separate, distinct and unrelated to any future process necessary for the salability or shipment in interstate commerce; that this process is a distinct and intricate process by which they become merchantable food and salable in that form, prior to any process needed or required in canning. It appears from the evidence that in the case of oysters a long, distinct

(60)

and intricate process is carried on from the time the oysters are removed from the boat until they are sold by the crew and captain at the window where they then become the property of the purchaser and can be canned at the plant or sent to some other plant, or sold to some other person for canning. The evidence and admissions show that practically the same initial process is carried on, has been used for 50 or 60 years, and that during that time it has been a common practice to ship these oysters to be canned in other states or for one factory to can the processed meat of another factory, so that when the oysters are finally sold to the factory, by means of the

efforts of the Defendants, and others similarly situated, they have completed an initialed or original process, separate and apart from canning.

In the case of shrimp, it would appear that neither the crew, pickers, or factory owners know of the purposes for which the shrimp are finally intended; that this depends upon their being cleaned and graded, and that a large percentage of the shrimp are afterwards shipped in friction top cans, protected by ice, or frozen with their skins on, and only a limited percentage ever go into canning. And it further appears from the evidence by way of admission and by way of documents, that the initial process of picking, beheading, washing from the time they arrive by boat until they are ready for some of the three processes mentioned herein, is a separate and distinct process, not necessarily related to canning.

It further appears from the evidence, the pleadings and the admissions, that each of the Plaintiffs employs about 200 laborers, about 40% of whom earn between 40 and 50¢ per hour, about 40% earn between

(61)

50 and 75¢ per hour, with the balance being able to earn from $1.00 to $1.50 per hour, and the ages of these persons range from 18 years to 70 or 75 years of age, and the earnings are influenced both by natural skill and aptitude of the worker as well as their age, in the performance in removing the shrimp and oysters from the hulls.

The Court, therefore, finds as a matter of fact that the Defendants are engaged in the processings of seafood (other than canning).

CONCLUSIONS OF LAW FROM THE ABOVE FACTS.

The Court finds the law on the above facts as follows:

That the Plaintiffs, both of them, under the above facts, employ the Defendants, and those workers similarly situated, in work involving the processing of aquatic matter (other than canning), and the Plaintiffs, therefore, are exempt from any obligation to the employees, or to other persons similarly situated, under Sections 206 and 207, Title 29 U.S.C.A., being Sections 6 and 7, 52 Stat. 1062 and 1063, as amended, such persons being specifically exempted from the provisions of the Wage and Hour Law, being Section 213, Title 29 U.S.C.A., as amended, such persons being specifically exempted from the provisions of the Wage and Hour Law, being Section 213, Title 29, U.S.C.A., as amended, being Section 11 C. 736-63, Stat. 917, which section exempts all persons engaged in the taking, harvesting, cultivating, farming, loading, unloading, packing, marketing, freezing, curing, storing, or distribution of aquatic products in interstate commerce except for canning.

(62)

In arriving at its conclusion of law, the Court has considered among others, the following authorities:

Section 13 of the Wage and Hour Law, being Section 11 C. 736, 63 Stat. 917, being Section 213, Title 29 U.S.C.A., as amended.

Wala v. Humphries, 133 F. (2d) 193.

McComb v. Consolidated Canning Company, 174 F. (2d) 74, Definition of word Can in Century Dictionary as follows:

Can: To put into a can; especially, to put into sealed metal cans or glass jars, for preservation, as prepared vegetables, fruits and meats.

Definition of word Canning, 12 Corpus Juris Secundum, page 892.

Henry v. Markeston State Bank, 68 F. (2d) 554, 557.

State v. Pacific American Fisheries, 131 p. 452, 454. 73 Wash. 37.

This the 3rd day of July, A. D., 1950.

(S.) S. C. MIZE,
Judge.

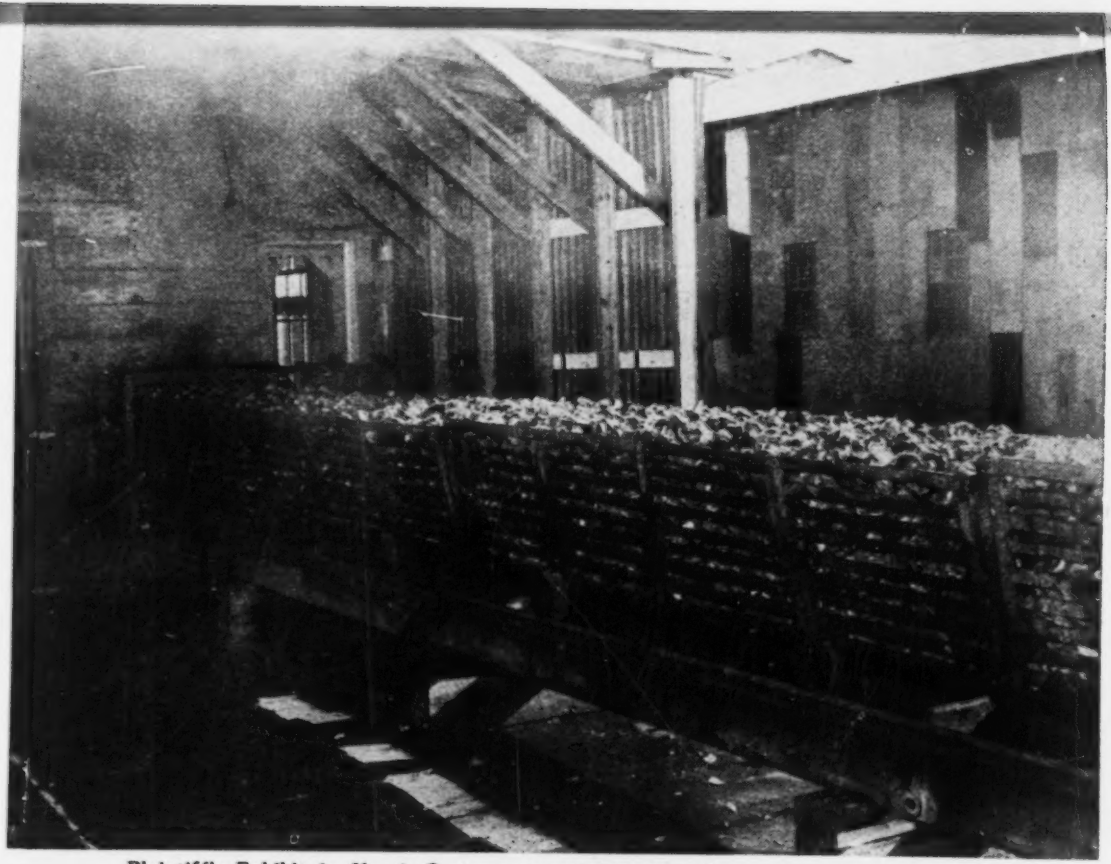
APPENDIX 2

Pictures 1 to 9 showing the process of steaming and removing the oyster meat from their shells originating in the hold of the vessel and ending with the sale of this meat to the factory, introduced in evidence as Plaintiff's Exhibit 1 in Donnelly v. Mavar Shrimp & Oyster Co., 190 F. (2d) 409.

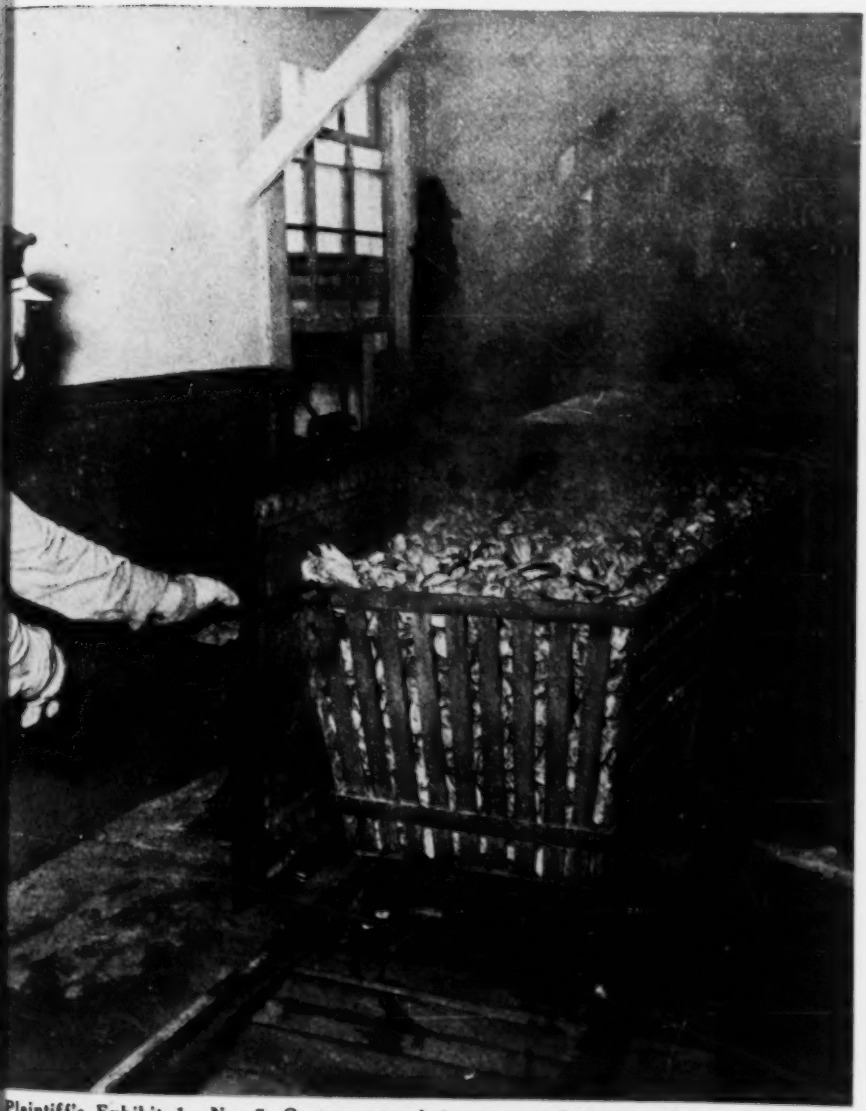
Plaintiff's Exhibit 1—No. 1. Unloading at dock oysters in shell from fishing boat.

Plaintiff's Exhibit 1 — No. 8 — At unloading platform

Plaintiff's Exhibit 1—No. 3. Interior view of oyster washer and inspection belt. At this point oysters are loaded into steam cars.



Plaintiff's Exhibit 1—No. 4. Oyster cars entering steam box.



Plaintiff's Exhibit 1—No. 5. Oyster cars being removed from steam box after steaming.

Plaintiff's Exhibit 1—No. 6. Oyster shuckers at work.

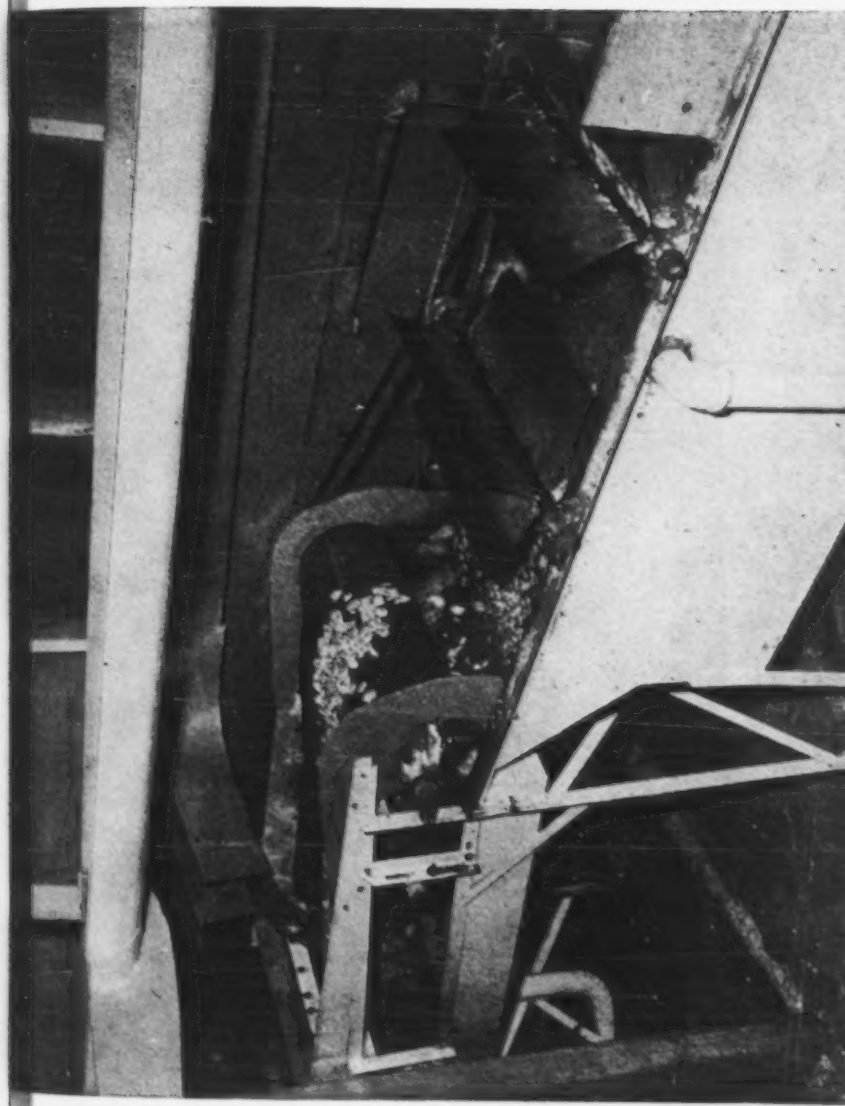
Plaintiff's Exhibit 1—No. 7. Oyster shuckers at work.

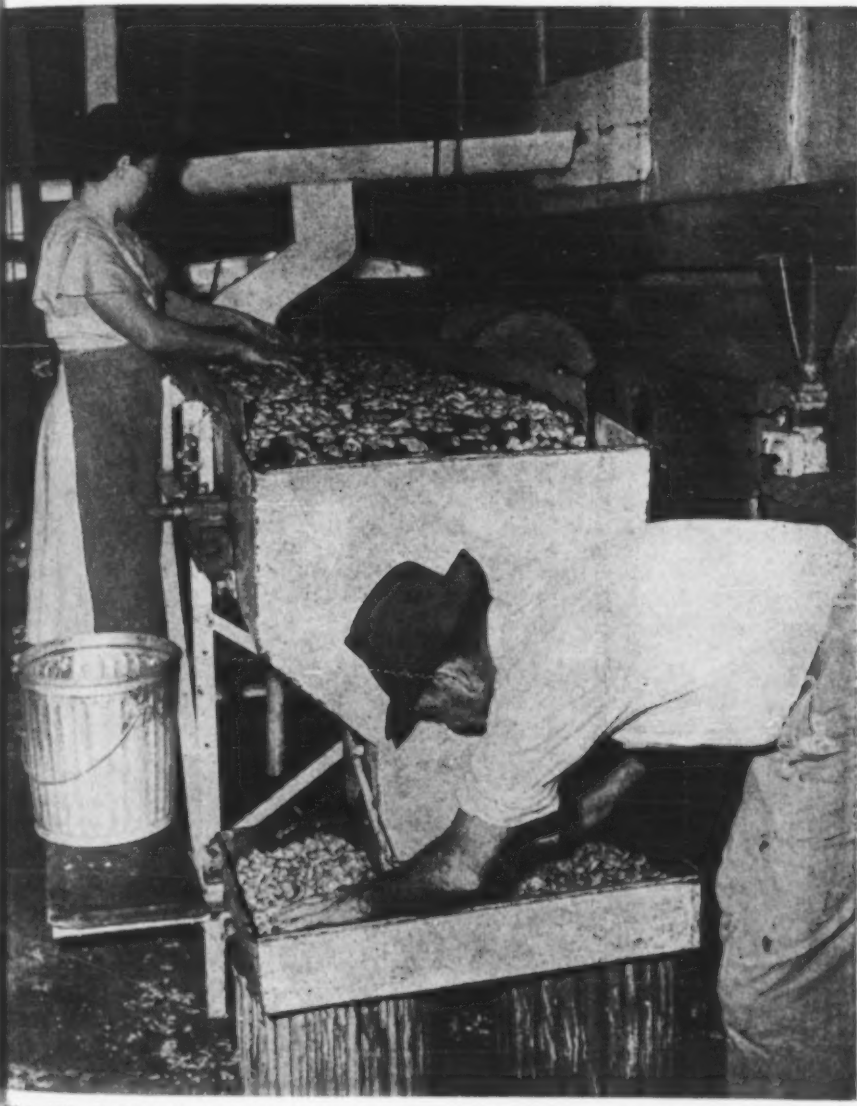
Plaintiff's Exhibit 1—No. 8. Oyster shuckers at work.

Plaintiff's Exhibit 1—No. 9. Oyster shucker having shucked meats weighed up in order to arrive at amount earned.

APPENDIX 3

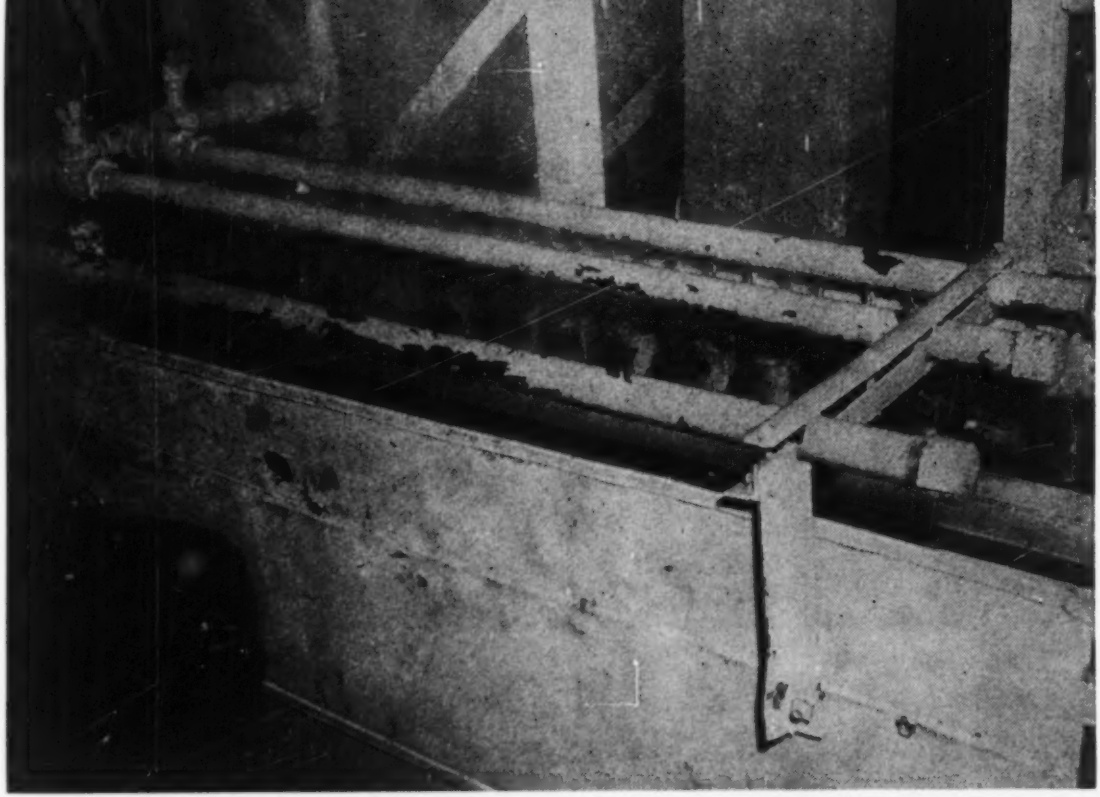
Pictures from 1 to 9 showing process of the actual canning of oysters from the washing of the purchased oysters to the labeling of the goods for shipment, introduced in evidence as Plaintiff's Exhibit 2 in Donnelly v. Mavar Shrimp & Oyster Co., 190 F. (2d) 409.



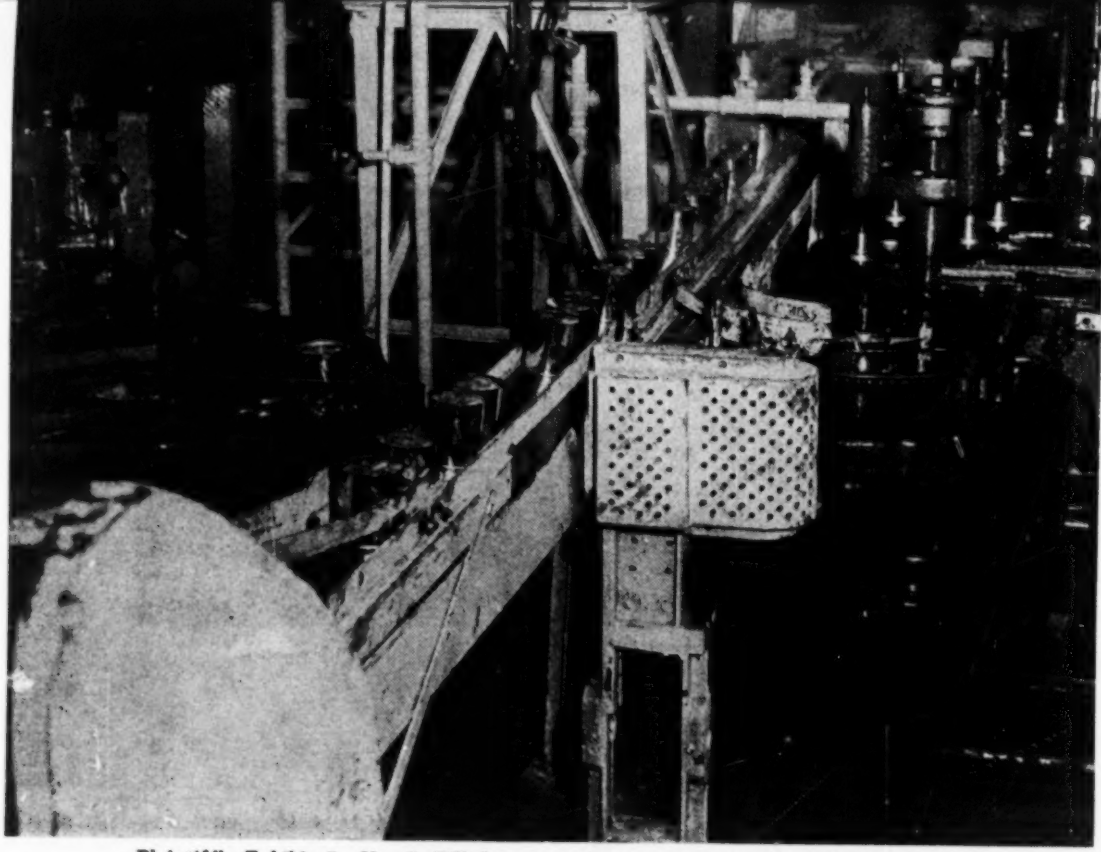


Plaintiff's Exhibit 2—No. 2. Oysters passing over inspection belt after washing.

Plaintiff's Exhibit 2—No. 3. The canning operation . . . placing oyster meats in cans and weighing.

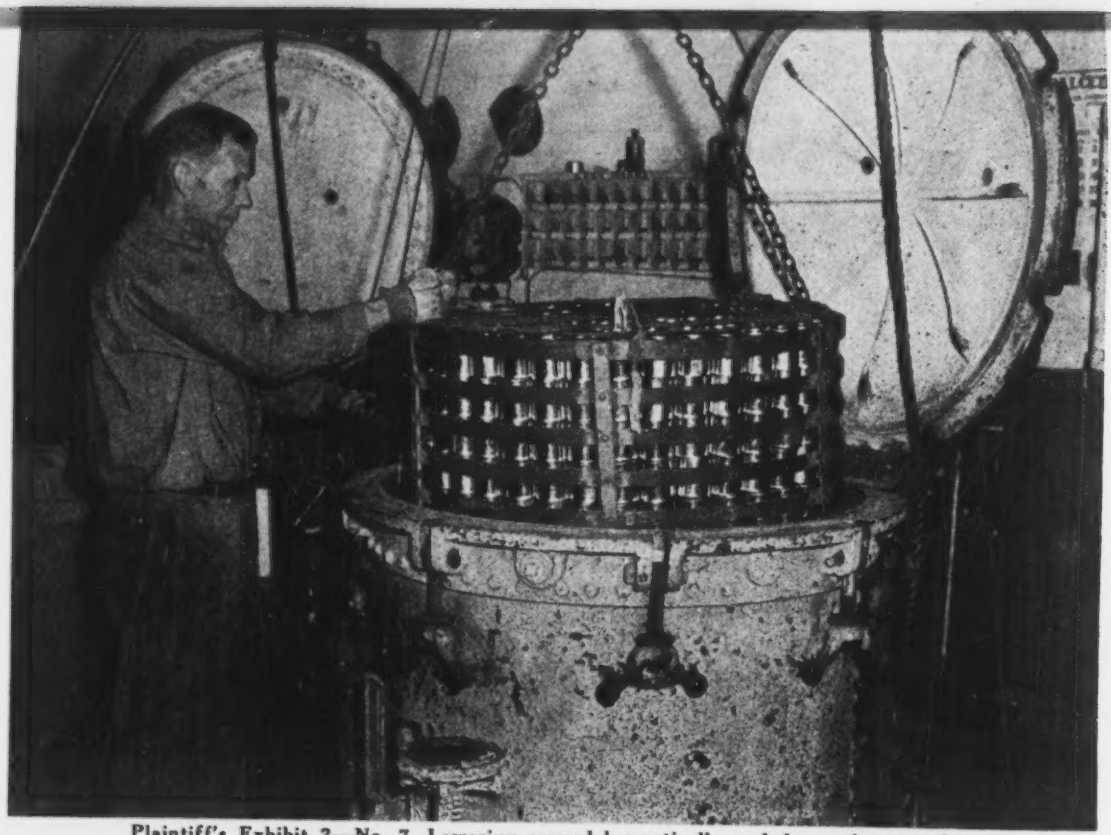


Plaintiff's Exhibit 2—No. 4. Filling cans with water on assembly line prior to capping.



Plaintiff's Exhibit 2—No. 5. Filled cans passing down canning line prior to capping.

aintiff's Exhibit 2—No. 6. Cans after capping being placed in process baskets.



Plaintiff's Exhibit 2—No. 7. Lowering capped hermetically sealed cans into vat for purpose of final steaming or processing, this being necessary to preserve the canned food. In this kettle

intiff's Exhibit 2—No. 8. Casing finished product after processing.

ff's Exhibit 2—No. 9. Labeling and preparing the goods for shipment.

APPENDIX 4

Pictures showing the processing of shrimp 1 to 6, from the time the same is received at the wharf of the factory until the shrimp are in a condition either for shipment raw or to be placed in hermetically sealed, sterilized cans, or to be placed in friction type cans which have to be shipped by the use of refrigeration, introduced in evidence as Plaintiff's Exhibit 3 in Donnelly v. Mavar Shrimp & Oyster Co., 190 F. (2d) 409.

Plaintiff's Exhibit 3—No. 1. Unloading iced shrimp from hold of vessel to conveyor belt.

Plaintiff's Exhibit 3—No. 3. Showing shrimp after passing washing belt by inspec-

Plaintiff's Exhibit 3—No. 4. Emptying inspected and washed shrimp on picking table.

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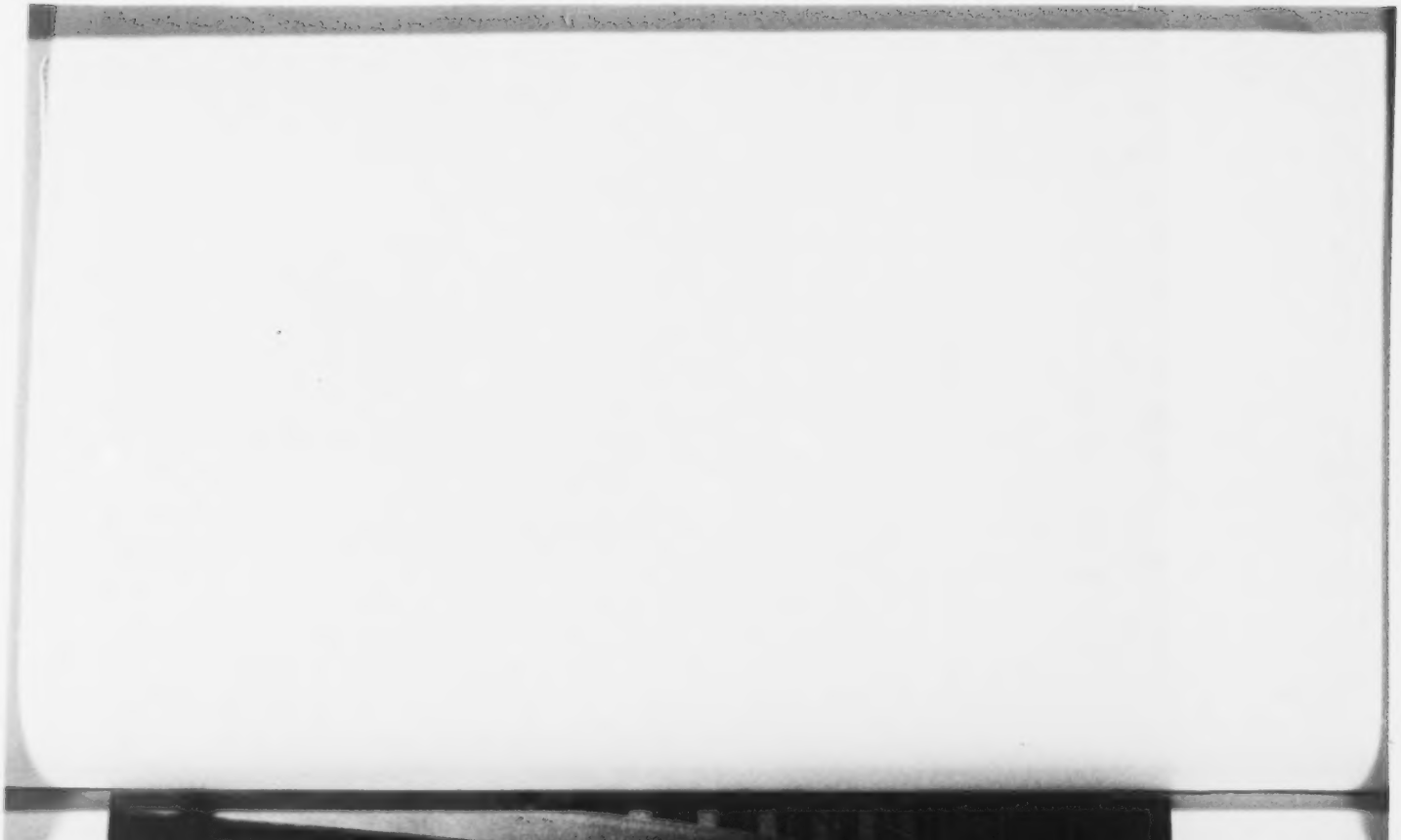


Plaintiff's Exhibit 3—No. 5. (a) Shrimp being picked by pickers on table.

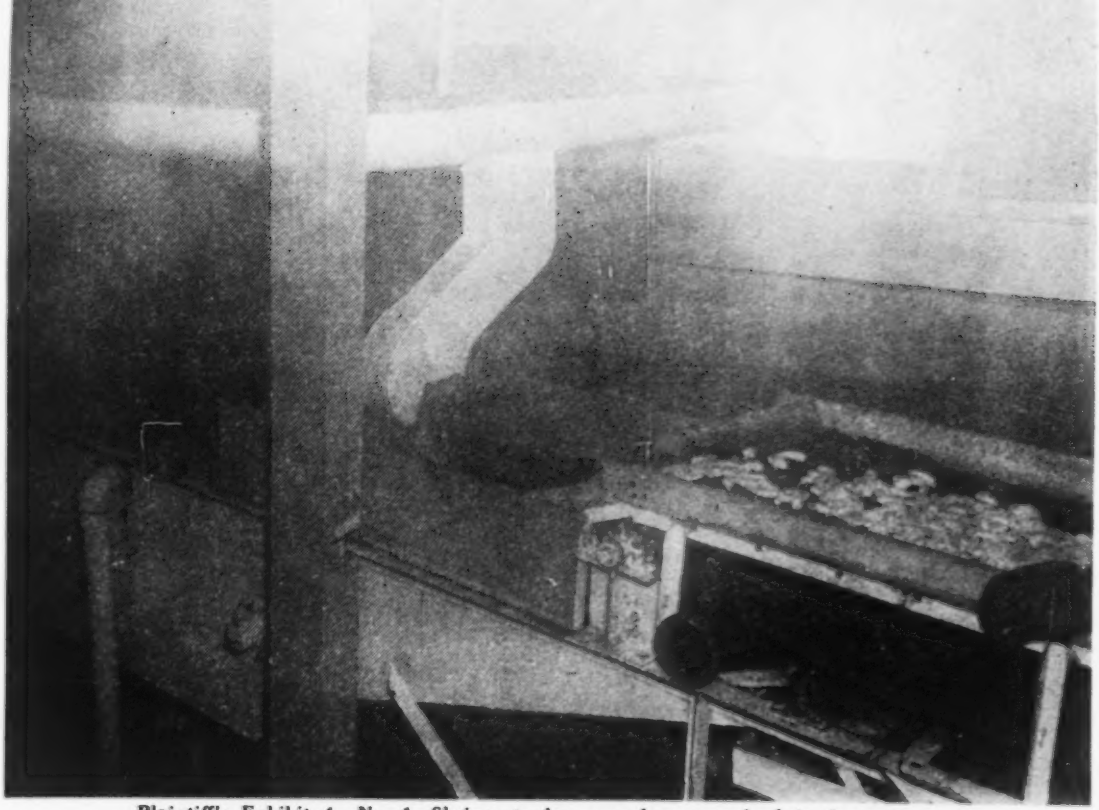
Plaintiff's Exhibit 3—No. 5. (b) Same operation as No. 5 (a).

Plaintiff's Exhibit 3—No. 5. (c) Same operation as No. 5 (a).

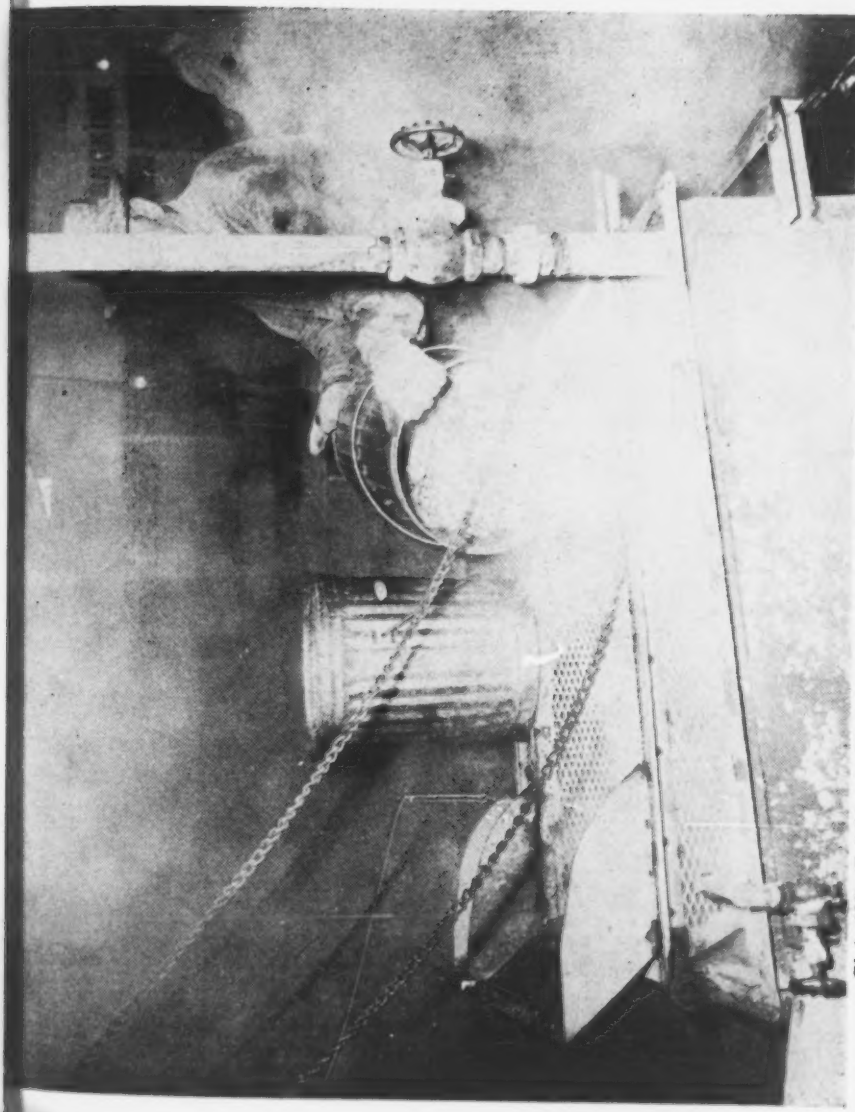
Plaintiff's Exhibit 3—No. 6. A view of picked meat after the completion of original processing. This meat can then either be canned in hermetically sealed and sterilized cans, or shipped raw in the state as shown by the picture, or cooked and placed in friction top cans and shipped in a refrigerated condition.

APPENDIX 5

Process required in canning shrimp. Pages 1 to 10. Introduced in evidence as Plaintiff's Exhibit 4 in Donnelly v. Mavar Shrimp & Oyster Co., 190 F. (2d) 409.

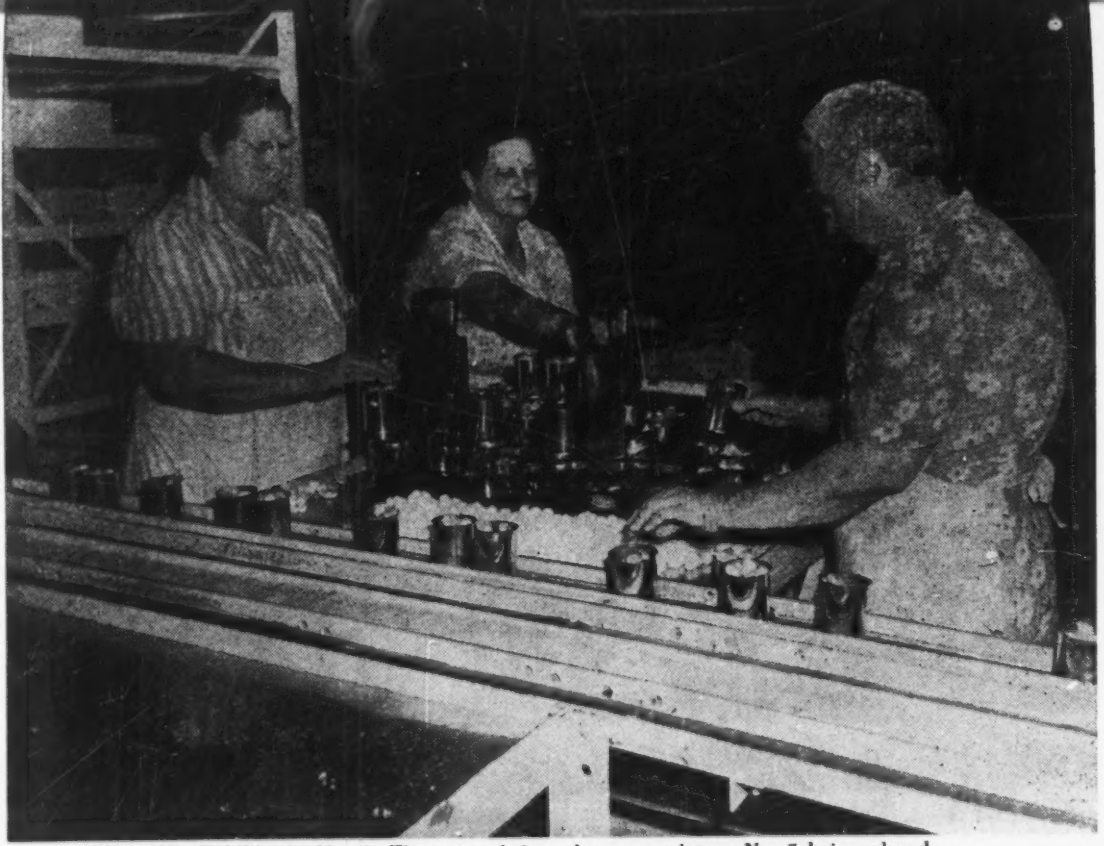


Plaintiff's Exhibit 4—No. 1. Shrimp to be canned are received in factory on receiving belt shown here.

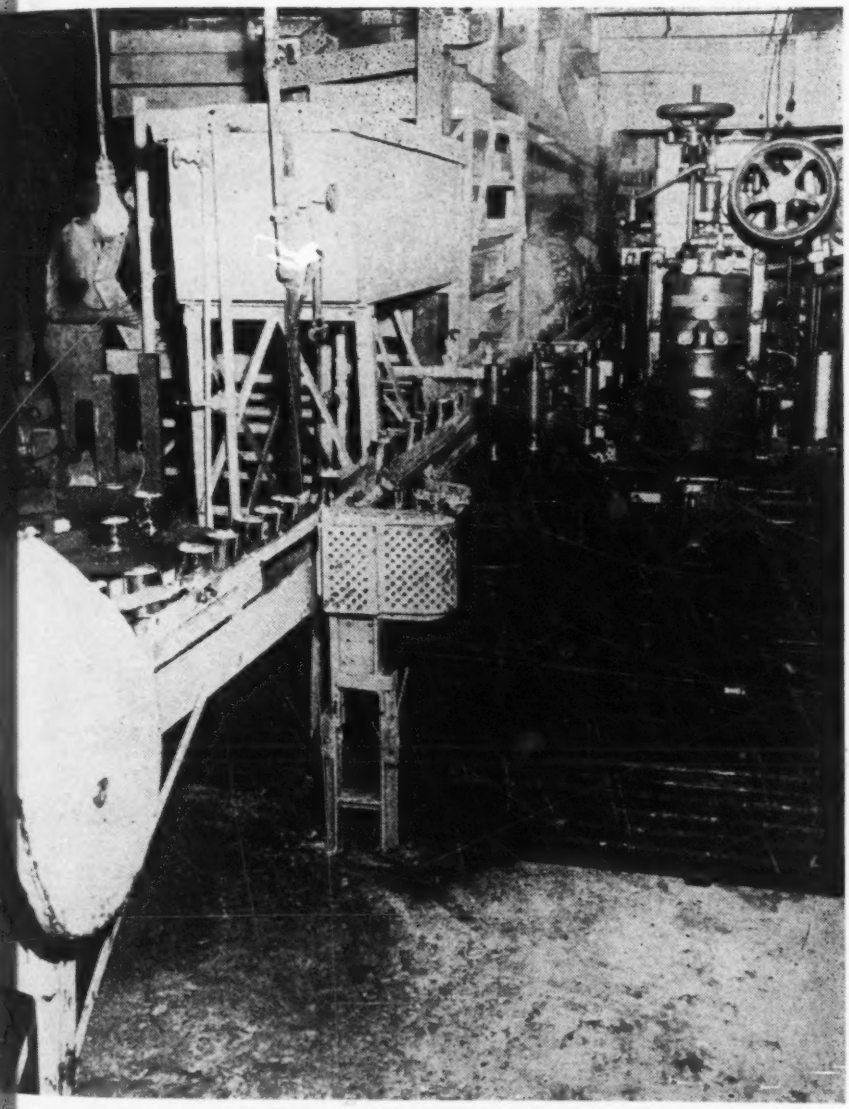


Plaintiff's Exhibit 4—No. 3. Showing shrimp after cooking being transported on cooling and inspection belt.

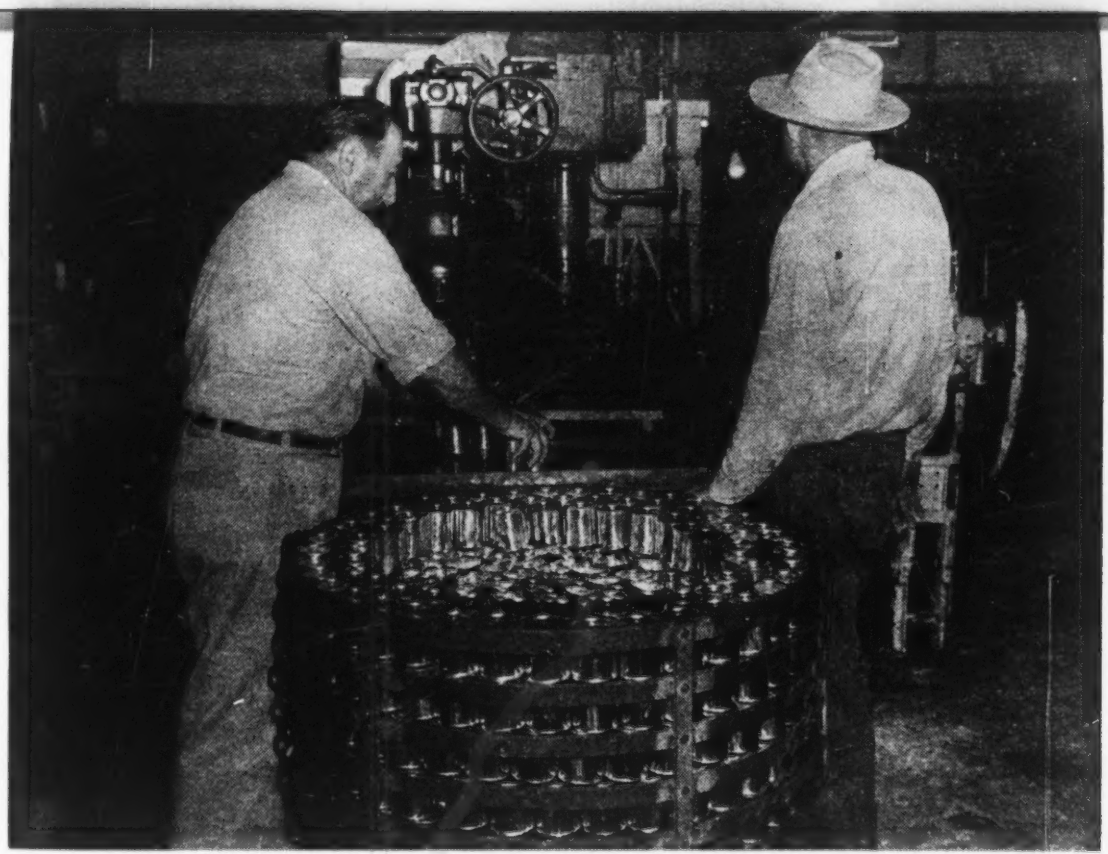
Plaintiff's Exhibit 4—No. 4. The same shrimp shown on picture No. 3 being cooled and graded for size.



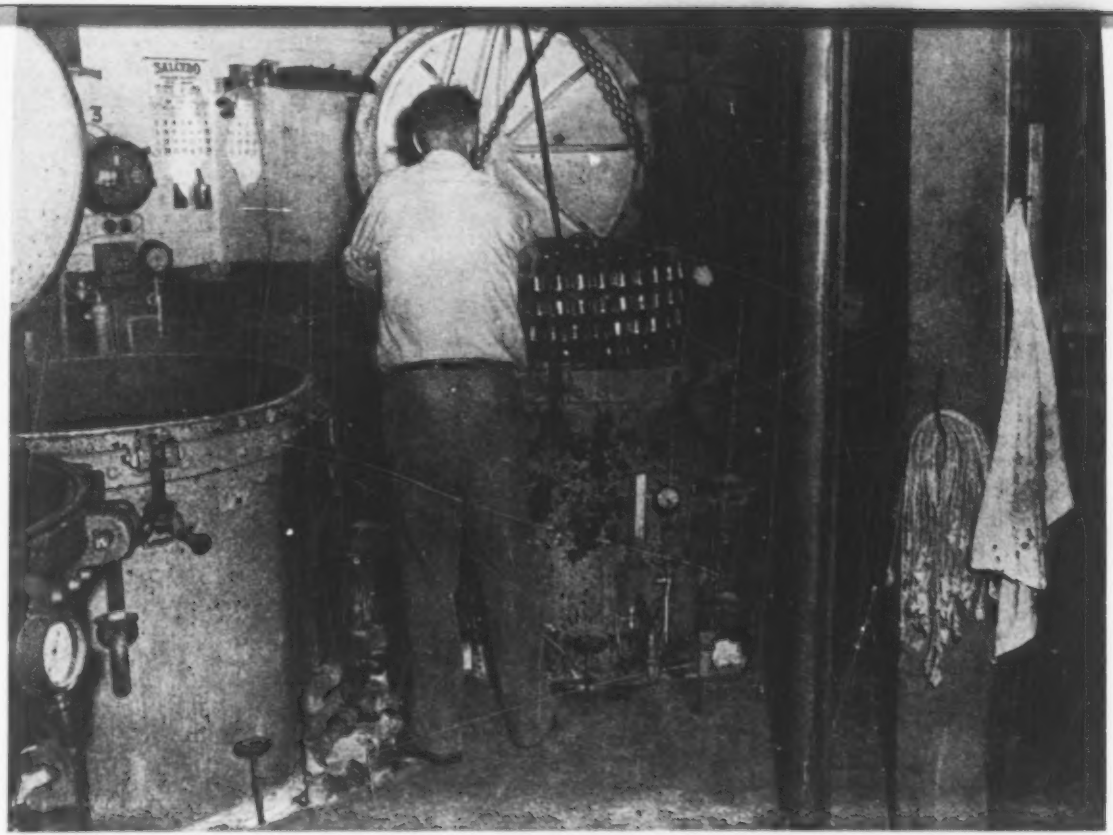
Plaintiff's Exhibit 4—No. 6. The same shrimp shown on picture No. 5 being placed in cans preparatory to sealing.



Plaintiff's Exhibit 4—No. 7. Showing the same shrimp after cans are filled with water traveling down picking line to be sealed, also showing canning machine which hermetically seals cans.



Plaintiff's Exhibit 4—No. 8. Canned shrimp being placed in basket preparatory to



Plaintiff's Exhibit 4—No. 9. Basket being dropped into kettle or drum for the purpose of being sterilized for 13 minutes at 250° Fahrenheit

Plaintiff's Exhibit 4—No.10. The sealed and sterilized shrimp being removed from basket into cases for shipment.

NOVEMBER 14, 1955.

Decisions Per Curiam.

No. 44. MITCHELL, SECRETARY OF LABOR, *v.* MYRTLE GROVE PACKING CO. Certiorari, 349 U. S. 937, to the United States Court of Appeals for the Fifth Circuit. Argued November 10, 1955. Decided November 14, 1955. *Per Curiam:* The Court, agreeing with the construction of the Fair Labor Standards Act given it by the Fourth Circuit Court of Appeals in *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245, reverses the judgments below. *Bessie Margolin* argued the cause for petitioner. With her on the brief were *Solicitor General Sobeloff, Gray Thoron, Stuart Rothman* and *Harold S. Saxe. W. L. Guice* argued the cause and filed a brief for respondent. Reported below: 217 F. 2d 952.